



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

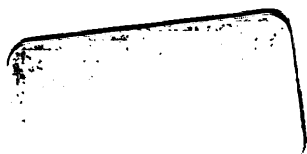
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



✓ CASES DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS,

FOR THE

Eighth Circuit.

REPORTED BY

JOHN F. DILLON,

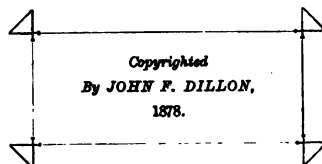
THE CIRCUIT JUDGE.

VOLUME IV.

DAVENPORT, IOWA:

EGBERT, FIDLAR, & CHAMBERS.

1878.



**LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.**

"Of late we have found so many wandering and masterless reports, like the soldiers of Cadmus, daily rising up and jostling each other, that our learned Judges have been forced to provide against their multiplicity by disallowing some posthumous reports; well considering that as laws are the anchors of the republic, so the Reports are as the anchors of law, and therefore ought to be well weighed before put out." — BURTON: *Dedictory Epistle to Volume II. published in 1658, during the Commonwealth.*

"With an enlightened bar and an intelligent people, the mere authority of the bench will cease to have any weight at all, if it be unaccompanied with argument and explanation." — LORD BROUENHAM.

"English jurisprudence has not any sure foundation, nor consequently, the lives and properties of the subject any sure hold but in the maxims, rules, principles, and juridical traditionary line of decisions contained in notes taken from time to time, and published mostly under the sanction of the Judges, called Reports." — BURKE.

JUDGES
OF THE
United States Circuit Courts,
FOR THE
EIGHTH CIRCUIT.

HON. SAMUEL F. MILLER, LL. D., Supreme Court Justice assigned
to the Circuit.

HON. JOHN F. DILLON, LL. D., Circuit Judge for the Circuit.

DISTRICT JUDGES. .

HON. RENSSELAER R. NELSON, Minnesota.

HON. JAMES M. LOVE, Iowa.

HON. SAMUEL TREAT, Eastern District Missouri.

HON. ARNOLD KREKEL, Western District Missouri.

HON. ELMER S. DUNDY, Nebraska.

HON. CASSIUS G. FOSTER, Kansas.

HON. HENRY C. CALDWELL, Eastern District Arkansas.

HON. ISAAC C. PARKER, Western District Arkansas.

HON. MOSES HALLETT, District of Colorado.

TREATIES AND ACTS OF CONGRESS CONSTRUED.

1825.—Act of January 12, Louisville and Portland Canal Co.	601
1854.—Treaty of June 5, 1854, Miami Indians.	370
1862.—Act of July 1, Charter of Union Pacific R. R. Co.	367, 479
1864.—Act of July 2, Charter of Union Pacific R. R. Co. and branches	297, 307, 479, 497
1866.—Act of July 13, Internal Revenue,	71
1866.—Treaty of July 19, Cherokee Neutral Lands,	391, 396
1867.—Treaty of February 27, Pottawattamie Indians,	387
1871.—Act of February 24, Bridging the Missouri River,	479, 499
1873.—Act of March 3, Mandamus to Union Pacific R. R. Co.	479, 493
1874.—Act of June 22, Bankrupt Act.	111, 363
1875.—Act of March 3, Jurisdiction of Federal Courts,	239, 242, 264, 277, 426, 474, 559, 563, 566
1876.—Act of June 26, Creating Federal Courts in Colorado,	251, 260, 264, 265, 277

REVISED STATUTES OF THE UNITED STATES.

Section 639, subdivision 3.—Removal of Causes,	503
Section 719.—Injunctions at Chambers,	601
Section 720.—Injunctions to State Courts,	19
Section 753.—Habeas Corpus,	323
Section 828.—Clerk's Commissions,	230
Section 1024.—Joinder of Offenses in Indictment,	169
Section 1025.—Defective Indictments,—Arrest of Judgment,	1
Section 1037.—Remission of Indictments,	1
Section 2461.—Cutting Timber on Public Lands,	464
Section 3186.—Internal Revenue—Taxes—Demand,	71
Section 3213.—Internal Revenue—Collection of Taxes by Suit,	71
Section 3296.—Internal Revenue—Recovery of Penalties,	128
Section 4319.—Enrollment of vessels,	439
Section 4751.—Public Lands—Timber,	466
Section 4980.—Bankrupt Act,	162
Section 4984.—Bankrupt Act,	162
Section 5021.—Bankrupt Act,	501
Section 5044.—Bankrupt Act,	173, 361, 518, 549
Section 5045—47.—Bankrupt Act,	361
Section 5067.—Bankrupt Act,	165

Section 5088.—Bankrupt Act,	501
Section 5100.—Bankrupt Act,	131
Section 5101.—Bankrupt Act,	532
Section 5122.—Bankrupt Act,	366
Section 5132.—Bankrupt Act,	110, 407
Sections 5197, 5198.—National Banking Act,	358
Section 5219.—Taxation of National Banking Associations,	29
Section 5271.—Extradition,	412, 415
Section 5278.—Surrender of Fugitives,	323, 327
Section 5279.—Surrender of Fugitives,	323, 327
Section 5438.—Fraudulent Claims against the United States,	271
Section 5440.—Criminal Conspiracies,	128, 145, 407

CONSTITUTION OF THE UNITED STATES.

Article 1, Section 8.—Naturalization Laws,	425
Article 1, Section 8.—Purchase of Land by the United States for Forts, etc.	380
Article 3, Section 2.—Judicial Power,	429

CASES REPORTED.

Abbot v. Stratton,	316, <i>note</i> .	Bates v. Payson.	285
Albany, The	439	Betts, <i>In re</i> ,	93
Amer. Middlings Purifier Co. v. Milling Co.	100	Biddle v. Ramsey.	65, <i>note</i> .
Amer. Middlings Purifier Co. v. Christian,	448	Biddle, Tscheider v.	55
Ames and Duff v. Colorado Central Railroad Co.	251	Bly v. United States,	464
Ames v. Colorado Cent. Rail- road Company,	260	Board of Educat'n, Bonham v.	156
Andrews v. Bassett,	470	Bonham v. Board of Educat'n,	156
Andrews v. Case,	470	Boro v. Phillips County,	216
Andrews v. Kelly,	470	Barger, Chapman v.	557
Andrews v. Nichols,	470	Bayer, United States v.	407
Andrews v. Platt,	470	Brewer & Bemis Brewing Co. <i>In re</i> ,	345
Andrews v. Pratt,	470	Briggs v. Johnson County,	148
Andrews v. Pray,	470	Bracken v. Johnston,	518
Andrews v. Snyder,	470	Brooks v. Mills County.	524
Andrews v. Spear,	471	Brown v. Joy,	530, <i>note</i> .
Andrews v. Spear,	472	Brown, Lyman v.	529, <i>note</i> .
Anthony v. Jasper County,	136	Bull, <i>In re</i> ,	323
Atlantic Milling Co. Amer. Middlings Purifier Co. v.	100	Bunch, Mitchell v.	530, <i>note</i> .
Atlantic & Pacific Railroad Co. Bailey v.	35	Burlington Township, Guern- sey v.	372
Atlee v. Potter,	559	Burnham v. Chicago, etc. Railroad Co.	503
Arapahoe County v. Kansas Pacific Railway Co.	277	Caldwell, First Natl. Bank v.	314
Babbitt, Harris v.	185	Call, Palmer v.	566
Babbitt, Wilkinson v.	207	Case, Andrews v.	470
Bailey v. Atlantic & Pacific Railroad Co. of Missouri,	35	Chaffin v. City of St. Louis,	24
Bailey v. Sawyer,	463	Chaffin v. St. Louis, <i>et al.</i>	19
Baker v. Peterson,	562, <i>note</i> .	Chapman v. Bayer,	557
Balmear v. Otis,	558	Christian, Middlings Purifier Co. v.	448
Barney v. Keokuk,	593	City of Clarksville, Northwest- ern Packet Co. v.	18, <i>note</i> .
Bartlett v. Russell,	267	City of Hannibal, Northwest- ern Packet Co. v.	18 <i>note</i> .
Bassett, Andrews v.	470	City of Keokuk, Barney v.	593
		City of Louisiana, Northwest- ern Packet Co. v.	17, <i>note</i> .

City of St. Louis, Chaffin v.	24	Haight v. Holley,	531, <i>note</i> .
City of Clarksville v. North-western Packet Co.	18, <i>note</i> .	Hamilton, Thistle v.	162
Coffin, Payson v.	386	Hannibal (City of), North-western Packet Co. v.	18, <i>note</i> .
Collier Lead Co. Minnesota Oil Co. v.	431	Harris v. Babbitt,	185
Connecticut Mutual Life Insurance Co. White v.	177	Harris v. Exchange National Bank,	133
Connor v. Scott,	242	Harris, Mitchell v.	64, <i>note</i> .
Crafton, United States v.	145	Hazens, <i>Re</i> ,	549
Craigie v. McArthur,	474	Hebard, <i>Ex parte</i> ,	380
Craig v. Smith,	349	Holley, Haight v.	531, <i>note</i> .
Crawford County, Culver v.	239	Holliday, Moore v.	52
Crocker v. National Bank of Chetopa,	358	<i>In re Betts</i> ,	93
Culver v. Crawford County,	239	<i>In re Brewer & Bemis Brewing Co.</i>	345
Darlington v. Laclede County,	200	<i>In re Bull</i> ,	323
Denver National Bank, Trinidad National Bank v.	291	<i>In re Dodge</i> ,	532
Dodge, <i>In re</i> ,	532	<i>In re Goodrich</i> ,	230
Durkin, Walsh v.	530, <i>note</i> .	<i>In re Israel</i> ,	501
Everest, Morse v.	65, <i>note</i> .	<i>In re Peltasohn</i> ,	107
Exchange National Bank, Harris v.	133	<i>In re Salky v. Gerson</i> ,	110, <i>note</i> .
<i>Ex parte</i> Hebard,	380	<i>In re Shields</i> ,	588
<i>Ex parte</i> Peters,	169	<i>In re Slevin</i> ,	131
<i>Ex parte</i> Shaffenburg,	271	Insurance Co. (Conn. Mutual Life), White v.	177
<i>Ex parte</i> Van Hoven,	411	Iron Mountain Bank, Phelan v.	88
<i>Ex parte</i> Van Hoven,	415	Iron Mountain Railroad Co. Parmely v.	35
Farmers' Loan and Trust Co. v. Iowa Central Railroad,	533	Israel, <i>In re</i> ,	501
Farmers' Loan and Trust Co. v. Iowa Central Railroad,	546	Jasper County, Anthony v.	136
First Natl. Bank v. Caldwell,	314	Jefferson County, United States v.	238, <i>note</i> .
Fourth Natl. Bank v. Papin,	29	Johnston, Bracken v.	518
French v. Burlington, etc. Railway Co.	570	Johnson County, Briggs v.	148
Gaffney v. Gillette,	264, <i>note</i> .	Johnson, Litchfield v.	551
Gerson, <i>In re Salky</i> v.	110, <i>note</i> .	Joy, Brown v.	530, <i>note</i> .
Gery, Milnes v.	64, <i>note</i> .	Joy, Langdon v.	391
Gillette, Gaffney v.	264, <i>note</i> .	Kansas Pacific Rwy. Meier v.	378
Goodrich, <i>In re</i> ,	230	Kelly, Andrews v.	470
Gotzian, Owens v.	436	Keokuk, Barney v.	593
Greason v. Keteltas,	65, <i>note</i> .	Ketchum <i>et al.</i> v. Pacific Railroad Co. of Mo. <i>et al.</i>	87, <i>note</i> .
Guernsey v. Burlington Township,	372	Ketchum v. Pacific Railroad Co. of Mo.	41, <i>note</i> .
		Ketchum v. Pacific Railroad of Missouri,	78

Keteltas, Greason v.	65, note.	Missouri Valley Life Insurance Co. Smith v.	353
Laclede County, Darlington v.	200	Mitchell v. Bunch,	530, note.
Langdon v. Joy,	391	Mitchell v. Harris,	64, note.
Lathrop v. Nelson,	194	Moore v. Holliday,	52
Lanz v. Randall,	425	Morse v. Everest,	65, note.
Leavenworth Sav. Bank, <i>Re</i> ,	363	National Bank v. Caldwell,	314
Lewis, Rogers Locomotive Works v.	158	National Bank of Chetopa, Crocket v.	358
Life Insurance Co. (Missouri Valley) Smith v.	353	National Bank of Missouri v. Papin,	29
Lippincott & Co. Player v.	124	National Bank of Trinidad v. Denver National Bank,	290
Lippincott, Player v.	125, note.	Nelson, Lathrop v.	194
Litchfield v. Johnson,	551	Newell v. Newton,	531, note.
Locomotive Works (Rogers), Lewis v.	158	Newton, Newell v.	531, note.
Louisiana (City of), Northwestern Packet Co. v.	17, note.	Nichols, Andrews v.	470
Louisville, etc. Canal Co. United States v.	601	Northwestern Packet Co. v. Clarksville,	18, note.
Love, McTilton v.	531, note.	Northwestern Packet Co. v. Hannibal,	18, note.
Lyman v. Brown,	526, note.	Northwestern Packet Co. v. Louisiana,	17, note.
McArthur, Craigie v.	474	Northwestern Life Insurance Co. v. Overholt,	287
McCord v. McNeil,	173	Northwestern Packet Co. v. St. Louis,	10
McCullough v. Sterling Furniture Co.	563	Oil Co. (Minnesota) v. Collier Lead Co.	431
McKee, United States v.	1	Otis, Balmear v.	558
McKee, United States v.	128	Overholt, Northwestern Mut. Life Insurance Co. v.	287
McNeil, McCord v.	173	Owens v. Gotzian,	436
McTilton v. Love,	531, note.	Palmer v. Call,	566
Meier v. Kansas Pacific Railway,	378	Payne, United States v.	387
Merchants' National Bank v. Papin,	29	Payson, Bates v.	265
Miami County, Peck v.	370	Payson v. Coffin,	386
Middlings Purifier Co. (American) v. Christian,	448	Pacific Railroad Co. (of Mo.) Ketchum v.	41, note.
Middlings Pur. Co. (Amer.) v. Milling Co. (Atlantic)	100	Pacific Railroad Co. (of Mo.) Ketchum v.	78
Miller County, United States v.	233	Pacific Railroad Co. (of Mo.) <i>et al.</i> Ketchum <i>et al.</i> v.	87, note.
Miller v. Sullivan,	340	Pacific Railroad Co. (of Mo.) Paul v.	35
Milling Co. (Atlantic) Middlings Pur. Co. (Amer.) v.	100	Pacific Railroad Co. (of Mo.) United States v.	66
Mills County, Brooks v.	524		
Milnes v. Gery,	64, note.		
Minnesota Oil Co. v. Collier Lead Co.	431		

Pacific Railroad Co. (of Mo.)	Railroad Co. (Pacific) v.
<i>et al.</i> United States v. 71	Ketchum, . . 41 <i>note</i> , 78, 87, <i>note</i> .
Papin, Fourth Natl. Bank v. 29	Railroad Co. (Union Pacific) v.
Papin, Merchants National	Pottawattamie County, 497, <i>note</i> .
Bank v. 29	Railroad Co. (Pacific) Paul v. 35
Papin, National Bank of Mis-	Railroad Company v. Schur-
souri v. 29	meier, 599, <i>note</i> .
Papin, St. Louis Natl. Bank v. 29	Railroad Co. (Mo. River, etc.)
Papin, Third National Bank v. 29	Stroud v. 396.
Papin, Valley Natl. Bank v. 29	Railroad Co. (Union Pacific),
Paret v. Ticknor, 111	Thurston v. 321
Parmely v. Iron Mountain	Railroad Co. (St. Louis & Iron
Railroad Co. 35	Mountain) Union Trust
Paul v. Pacific Railroad Co. of	Company v. 114
Missouri, 35	Railroad Co. (Pacific) <i>et al.</i>
Peck v. Miami County, 370	United States v. 66, 71
Peltasohn, <i>In re</i> , 107	Railroad Co. (B. & M. R. R. Co.)
Peters, <i>Ex parte</i> 169	United States v. 297
Peterson, Baker v. 562, <i>note</i> .	Railroad Co. (Union Pacific)
Phelan v. Iron Mount'n Bank, 88	v. United States, 479
Phillips County, Boro v. 216	Railroad Co. (Union Pacific),
Player v. Lippincott, 125, <i>note</i> .	Wardell v. 330.
Player v. Lippincott & Co. 124	Railroad Co. (Burlington, etc.)
Platt, Andrews v. 470	United States Wind Engine
Pottawattamie County, Union	Company v. 580
Pacific Railroad Co. v. 497 <i>note</i> .	Railroad Co. (Burlington, etc.)
Potter, Atlee v. 559	Union Rolling Mill Co. v. 579
Pratt, Andrews v. 470	Railroad Co. (Kansas Pacific)
Pray, Andrews v. 470	United States v. 367
Pulaski County, Shirk v. 209	Ramsey, Biddle v. 65, <i>note</i> .
Railroad Co. (Colorado Cent.)	Randall, Lanz v. 425
Ames and Duff v. 251	<i>Re</i> Hazens, 549
Railroad Co. (Colorado Cent.)	<i>Re</i> Leavenworth Sav. Bank, 363
Ames v. 260	<i>Re</i> Scrafford, 377
Railroad Co. (Kansas Pacific)	Rogers Locomotive Works v.
Arapahoe County v. 277	Lewis, 267
Railroad Co. (Chicago, Du-	Russell, Bartlett v. 267
buque & Minnesota) Burn-	Salky, <i>In re</i> , Gerson v. 110
ham v. 508	Salmon v. Wooton, 530, <i>note</i> .
Railroad Co. (Iowa Central)	Sawyer, Bailey v. 463
Farmers' Loan and Trust	Schurmeier, R. R. Co. v. 599, <i>note</i> .
Company v. 533	Scott, Connor v. 242
Railroad Co. (Iowa Central)	Scott, Thompson v. 508
Farmers' Loan and Trust	Scrafford <i>Re</i> , 376
Company v. 546	Shaffenburg, <i>Ex Parte</i> , 271
Railroad Co. (Burlington, etc.)	Shields, <i>In re</i> , 588
French v. 570	Shirk v. Pulaski County, 209

CASES REPORTED.

13

Silverman, United States v.	224	United States v. Kansas Pacific	
Sioux City Railroad Co. v.		Railway Company,	367
Union Pacific Railroad Co.	307	United States v. Louisville	
Slevin, <i>In re</i> ,	131	Canal Co.	601
Smith, Craig v.	349	United States v. McKee,	1
Smith v. Missouri Valley Life		United States v. McKee,	128
Insurance Co.	353	United States v. Miller County,	238
Smith v. Woodworth,	584	United States v. Pacific Rail-	
Snyder, Andrews v.	470	road of Missouri,	66
Spear, Andrews v.	470	United States v. Pacific Rail-	
Spear, Andrews v.	472	road of Missouri <i>et al.</i>	71
Sterling Furniture Co. v.		United States v. Payne,	387
McCullough,	563	United States v. Silverman,	224
St. Louis <i>et al.</i> Chaffin v.	19	United States v. Union Pacific	
St. Louis National Bank v.		Railroad Company,	479
Papin,	29	United States Wind Engine	
St. Louis, Northwestern		Co. v. Burlington, etc. Rail-	
Packet Co. v.	10	road Company,	580
Stratton, Abbot v.	316, note.	Union Pacific Railroad Co.	
Stroud v. Missouri River, etc.		Sioux City Railroad Co. v.	307
Railroad Co. v.	396	Union Rolling Mill Co. v. Bur-	
Sullivan, Miller v.	340	lington, etc. Railway Co.	579
The Albany,	439	Union Trust Co. v. St. Louis &	
Third Natl. Bank v. Papin,	29	Iron Mountain Railroad Co.	114
Thistle v. Hamilton,	162	Upton v. Tribblecock,	232, note.
Thompson v. Scott,	508	Valley Natl. Bank v. Papin,	29
Thurston v. Union Pacific,		Van Hoven, <i>Ex parte</i> ,	411
Railroad Co.	321	Van Hoven, <i>Ex parte</i> ,	415
Ticknor, Paret v.	111	Vesey, Wadleigh v.	529, note.
Towner, Walker v.	165	Wadleigh v. Vesey,	529, note.
Tribblecock, Upton v.	232, note.	Walker v. Towner,	165
Trinidad Natl. Bank v. Den-		Walsh v. Durkin,	530, note.
ver National Bank,	290	Wardell v. Union Pacific Rail-	
Tscheider v. Biddle,	55	road Company,	330
United States v. Bayer,	407	White v. Connecticut Mutual	
United States, Bly v.	463	Life Insurance Co.	177
United States v. Burlington &		White v. Whitman,	529, note.
Missouri Railroad Co.	297	Whitman, White v.	529, note.
United States v. Crafton,	145	Wilkinson v. Babbitt,	207
United States v. Jefferson		Wooton, Salmon v.	530, note.
County,	238, note.	Woodworth, Smith v.	584

REPORTS OF CASES DETERMINED
IN THE
Circuit Courts of the United States,
FOR THE
EIGHTH JUDICIAL CIRCUIT.

THE UNITED STATES *v.* WILLIAM MCKEE.

1. The legislation of congress (Rev. Stats. sec. 1037) authorizing the district court, by order entered on its minutes, to remit any indictment pending therein to the circuit court, does not require that the clerk of the district court shall transmit the *original* indictment, but an exemplification of the record, including a certified *copy* of the indictment.
2. Where a record copy of the indictment was transmitted to the circuit court, to which no objection was made by the defendant, who pleaded thereto, and went to trial thereon, and was convicted, the original indictment remaining on the files of the district court, it was held that even if the original indictment, instead of a copy, should have been sent, this was waived by the defendant, and under the remedial provisions of the statute (Rev. Stats. sec. 1025), the defendant not having been prejudiced, was not entitled to have the judgment arrested.

(Before DILLON and TREAT, JJ.)

Remission of Indictment from District to Circuit Court.—What Record to be Transmitted.—Copy of Indictment.—Revised Statutes, Sec. 1037 Construed.—Arrest of Judgment.—Errors of Form.—Revised Statutes, Sec. 1025 Construed.

FROM the transcript which has been remitted to the circuit court by the district court of the United States for the eastern

United States v. McKee.

district of Missouri, it appears that at the November term, 1875, of the said district court, a grand jury found and returned an indictment against the defendant, which charged him with having conspired with certain individuals to defraud the United States of the tax on certain distilled spirits thereafter to be manufactured at designated distilleries, situated in the city of St. Louis.

To this indictment—having been arrested upon *capias*—the defendant was arraigned in the district court, entered his plea of not guilty, and was admitted to bail under a recognizance taken in open court.

At the same term of the district court, on motion of the attorney of the United States, it was ordered, by a proper entry upon the minutes, that the indictment be remitted to the adjourned September term of the circuit court, which was to convene on the 4th day of January, 1876, and that the defendant appear at said adjourned term, on said day, and answer said indictment and all orders touching the same which might be made by said circuit court.

The order, as entered of record in the district court and duly certified to the circuit court, is in the following words:

“This day comes the United States, by the district attorney, and on the motion of said attorney, it is ordered that the indictment in this cause be and hereby is remitted to the next adjourned term and session of the circuit court of the United States in and for the eastern district of Missouri, to be begun and holden at the city of St. Louis, in said eastern district of Missouri, on the first Tuesday, the 4th day, of January next, A. D. 1876, for proceedings thereon according to law. And it is further ordered that the said defendant, William McKee, be and appear at and before said circuit court on the said 4th day of January next, to answer to the charges as contained in the said indictment herein against him, and obey any and all the orders that may be made by said circuit court in relation to said indictment during the pending of the same, in obedience to the recognizance heretofore entered into by him herein.”

United States v. McKee.

In obedience to this order, the clerk of the district court certified under seal and remitted to the circuit court, a true transcript of the record and proceedings in the case, to which was appended the following certificate :

"I, Joseph H. Clark, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby certify the writings hereto annexed to be a true transcript of the indictment, *capias*, and return on same, and of the proceedings had in case No. 919, A. D. 1875, of the United States, plaintiff, against William McKee, defendant, as fully as the same remain on file and of record in said case, in my office."

This transcript of the record was duly filed in the circuit court. At the adjourned term (January, 1876), the defendant appeared in the circuit court and withdrew the plea of not guilty, and by leave of court demurred to the indictment, and the demurrer having been overruled, he thereupon again pleaded not guilty; was tried by a jury, which returned a verdict of guilty. A motion for a new trial was made and overruled, and now the defendant moves in arrest of judgment and to dismiss on the ground :

1. That there is no indictment against the defendant pending in the circuit court.
2. That the circuit court has no jurisdiction of the case.
3. That the defendant was not tried on the *original* indictment, but on an alleged copy thereof.

The *original* indictment was not transmitted by the clerk of the district court to this court, but a certified copy thereof; the original indictment and original papers all the time remaining in the district court. The objection that the original indictment, and not a copy thereof, should have been remitted to the circuit court, was not made or suggested until after the trial and verdict.

The order of remission was made under Revised Statutes, section 1037, which provides that "whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offense

United States v. McKee.

charged in the indictment is cognizable by the said district court; and, in like manner, any district court may remit to the next session of the circuit court of the same district any indictment pending in said district court, and such remission shall carry with it all recognizances, processes, and proceedings pending in the case in the court from which the remission is made; and the court to which such remission is made shall, after the order of remission is filed therein, act in the case as if the indictment and all other proceedings in the same had been originated in said court."

David P. Dyer, United States attorney, *James O. Broadhead* and *Lucien Eaton*, special United States assistant attorneys, for the United States.

Krum & Madill, *Henry A. Clover*, *D. W. Voorhees*, *Wm. M. Hatch*, for the defendant.

DILLON, *Circuit Judge*.—The objection relied on is that the circuit court acquired no jurisdiction over the defendant and the case, because under the order of the district court remitting the indictment, the *original* indictment was never transmitted to this court, but only a certified copy thereof. It is also contended by the defendant, that if the presence of the original indictment is not a *jurisdictional* requisite, yet, inasmuch as the statute contemplates that the defendant shall be tried upon the original, and not upon a copy, he has not been legally convicted, and judgment should be arrested. Both of these objections fail if the statute does not require the *original* indictment to be transmitted with the rest of the record and the order of remission.

When this question, which is new, and has never been decided, was first started, it occurred to us that the language of the statute (Rev. Stats. sec. 1037), viewed in connection with other statutes as to the removal of causes from state to federal courts, contemplated that the indictment, that is, the *original* indictment, and all recognizances, processes, and papers—in a word, the original files—should be transmitted to the court to which the

EASTERN DISTRICT OF MISSOURI, 1876.

United States v. McKee.

case is sent. Subsequent reflection and examination have satisfied us that the language of the section, taken altogether, shows that it was the purpose of congress to authorize the transfer from the one court to the other of a criminal case—of the whole case, and all the proceedings in the same—and this is the burden and object of the statute, and not the particular form in which the record of the one court should be sent to the other.

The case originated in the district court. The indictment and other proceedings therein were part of the records of that court. An indictment, when found by a grand jury, and presented to and received by the court, passes into and becomes a part of the records of the court. (1 Bishop Crim. Pro. [2d ed.] sec. 36; *State v. Gibbons*, 1 Southard [N. J.] 40.)

The indictment being the original accusation of the grand jury, and a part the records of the court to which it is presented, is always before the court, and in that court it is, perhaps (under the practice in this country), the best evidence of its existence and contents. But in other courts the practice and law are settled that the existence of an indictment and its contents may be shown by exemplification of the record of the court in which it is found, and it is not necessary, if, indeed, competent, to produce the original indictment. (*Porter v. Cooper*, 6 Carr. & Payne, 354; *Rex v. Smith*, 8 Barn. and Cres. 341; *Bishop v. State*, 30 Ala. 34; Roscoe Crim. Ev. [7 Am. ed.] 165; *Harrall v. State*, 26 Ala. 52; *Major v. State*, 2 Sneed [Tenn.] 11; *Vail v. Smith*, 4 Cowen, 71; 1 Greenl. Ev. sec. 502.)

And in England it is settled that the finding of an indictment in another court cannot be proved by the production of the original by the clerk of the court in which it is found, but it must be proved by a record regularly drawn up containing a copy of it. (*Rex v. Smith*, 8 Barn. and Cres. 341; Roscoe Crim. Ev. [7 Am. ed.] 165.) In England indictments found in inferior jurisdictions may be removed, with all the proceedings thereon, at any time before trial, into the King's Bench, to have their validity determined and to prevent a partial and

United States v. McKee.

insufficient trial in the court below. (1 Blacks. Com. 320, 321; 1 Chitty Crim. Law, 371 *et seq.*) The English books always speak of the "removal of the indictment" and the "delivery of the indictment" to the higher court, but in point of fact the original indictment remains in the court in which it is found, and only the record of it and the proceedings of record touching it are sent to the higher court. The removal is effected by the writ of *certiorari*, which issues out of the King's Bench, directed to the judges or officers of the inferior court in which the indictment is pending, and commands them to certify "all and singular the said indictment," etc. (1 Chitty Crim. Law, 387.) Notwithstanding the command of the writ is to certify the indictment, the writ is executed by transmitting "the record of the indictment" and the other proceedings of record thereon—and not the original indictment (1 Chitty Crim. Law, 394; *ib.* 334), where it is expressly said that the "copy of the indictment" is transmitted to the superior court. In the *State v. Gibbons* (1 Southard [N. J.] 40, 44), the *original* indictment was sent to the supreme court, and it was held to be improper and insufficient. The chief justice observed: "When the grand jury return into court and present an indictment, an entry is made in the minutes of such presentment, stating against whom the same is, and for what crime; and then the indictment itself passes to the files of the court, there to remain until it becomes necessary to make up the record, * * and then to be affiled among the rolls. In all cases where a *certiorari* is presented, whether before or after plea pleaded, it is essential that the proceedings, so far as they have gone, be enrolled, and that that roll, *and nothing else*, be certified to the upper court."

The removal of a criminal case in England after bill of indictment found, by *certiorari*, from an inferior to a superior jurisdiction, for trial by jury and judgment, is quite analogous to the remission provided for by the statutes of the United States from one of its courts to the other. The English books invariably speak of the "removal of indictments" by *certiorari* (see Chitty Crim. Law, chap. 10, p. 371), when, in fact, the removal

United States v. McKee.

is not of the original, but of the record duly certified, which includes a *copy* of the indictment. The command of the writ is to "send the *indictment*," which is obeyed by sending the *record* of the indictment. The trial is had upon the copy or record thus returned. So, when our statute provides for the remission of the indictment, it may well be construed to mean an exemplified copy or record of the indictment, to be sent with the other records pertaining to the case. It is just as important or as little important that the original bill of indictment found at the Sessions should be in the King's Bench for the trial of the defendant thereon by a jury as that it be in the federal court to which a criminal case has been sent by the court to which the indictment was originally presented. It is essential to the jurisdiction of the district court that the indictment should have been presented to it by a grand jury impanelled in that court, and these facts ought to appear of record therein. If that court acquired no jurisdiction before the order remitting the indictment, the circuit court could acquire none in consequence of the filing of the order of remission.

Undoubtedly, all the record relating to the case remitted, including recognizances taken in open court and entered of record, and all the proceedings of record, should be transmitted to the court to which the remission is ordered, as well as the indictment. All these other facts of record *must* go by exemplification or certified copy, and, if so, why not in the same manner the indictment and process? This is the usual way of transmitting or sending the record in a case from one court to another; and the practice contended for by the defendant of sending away the originals would compel the court in which the indictment was found to part with its records and leave them incomplete. And the books show that unless the statute requires the original papers to be sent, the practice is to send exemplifications or certified copies.

Very little aid is to be had from the decisions of the state courts construing special statutes on the subject of changes of venue in criminal cases. They all concur in holding that when

United States v. McKee.

the statute authorizes the trial to be had upon the record copy of the indictment instead of the original, this may be done. (*Harrall v. State*, 26 Ala. 52; *Major v. State*, 2 Sneed [Tenn.] 11; *Bishop v. State*, 30 Ala. 34; *Reynolds v. State*, 11 Texas, 120; *Ruby v. State*, 7 Mo. 206; *Bramlette v. State*, 31 Ala. 376.)

Whether the defendant may be tried or sentenced upon a copy of a *lost* indictment, is not a question before us, and in respect of which there may be doubt under the decisions, unless it is a copy of record. (*Ganaway v. State*, 22 Ala. 722; *Bradshaw's Case*, 16 Gratt. [Va.] 107; *Mount v. State*, 14 Ohio, 295; *Ruby v. State*, 7 Mo. 206; 1 Bish. Crim. Pro. [2d ed.] sec. 1215, and cases cited.)

In the case of *Browning v. State*, 30 Miss. 656, it was urged that the court erred in forcing the prisoner to trial on a copy of the indictment instead of the original. He was indicted in one county, and the venue was changed to another county. In a change of venue in civil cases the statute directed that the original papers be transmitted, but the statute in criminal cases made no provision on the subject. The clerk transmitted a certified copy of all the orders, etc., including a copy of the indictment, and it was held that the defendant was properly tried thereon. The court remarked that unless authority to transmit the original papers "is conferred by the legislature, it would be clearly illegal for the clerks of the circuit courts to part with the original papers or records pertaining to a prosecution therein pending. All that a clerk could do in such cases—and we must infer that it was all the legislature intended to be done—is to transmit a perfect transcript of all the original papers in the cause, the minutes or records of the court containing the orders, and proceedings of the court in relation to the same, properly certified." In *Shoemaker v. State*, 12 Ohio, 43, 51, the statute in terms required the "original indictment" to be transmitted when the prisoner elected to be tried in the supreme court.

Our judgment is that there is no positive requirement in the statute (Rev. Stats. sec. 1037) that the original indictment should be sent; that, like the other proceedings in the case, the

United States v. McKee.

indictment is part of the record of the cause, and that it was properly certified as such to the circuit court, and that on the filing of the same, with the order of remission, that court had jurisdiction to try the defendant on the indictment and record thus certified and filed.

But suppose we are mistaken in the view that the statute authorizes or requires the copy instead of the original indictment to be sent, does it follow that the court acquired no jurisdiction? A certified copy was sent. It is not suggested that it was not a faithful copy, word for word. The defendant treated the exemplified or record copy as the indictment. He demurred to it, and afterwards went to trial upon it. He made no objection to it. If he had been acquitted, it would certainly have been severe to have applied to him the doctrine his counsel now maintain to be correct, namely: that the whole proceeding was *coram non judice* and void, because the court had no jurisdiction, and hence he would be liable to be again tried.

It is indisputable that the defendant has suffered no prejudice in fact because he was tried upon the certified copy instead of the original. Having treated the record copy throughout as equivalent to the original, the defendant must be taken to have waived the right, if it exists, to a trial upon the original indictment, when he fails to make the objection until after verdict. The cases are numerous, particularly in modern times, and where the offense is a misdemeanor, in which rights, technical in their character, and where no prejudice has resulted, have been considered as waived. (*Ruby v. State*, 7 Mo. 206; *Major v. State*, 2 Sneed [Tenn.] 11; *Shaw v. State*, 18 Ala. 547; *Patterson v. United States*, 2 Wheat. 221; 1 Bish. Crim. Pro. secs. 117, 118, 125.)

Inasmuch as it is not claimed that the exemplification of the indictment on which the defendant was tried is in any respect variant from the original on file in the district court, we have the means of a positive assurance that there has been, and could be, no prejudice to the defendant because the trial was upon the one instead of the other. Thus the case, in any view which can

North-Western Union Packet Co. v. St. Louis.

be taken of it, comes within the remedial provisions of section 1025 of the Revised Statutes: "No indictment found and presented by a grand jury in any district or circuit or other court of the United States, shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

The motion in arrest and to dismiss are overruled.

TREAT, J., concurred.

MOTIONS OVERRULED.

NOTE.—Judgment was then pronounced, by which the defendant was ordered to pay a fine of \$10,000 and be imprisoned in the county jail for two years. Subsequently, the defendant, on the petition of a large number of the citizens of St. Louis, was granted an unconditional pardon by the President. Indictment and charge of the court to the jury in this case: See *United States v. McKee*, 3 Dillon, 546, 551.

Effect of the judgment and of the pardon on the civil liability of the defendant for the penalty denounced by section 3296 of the Revised Statutes: See *United States v. McKee*, *post*.

NORTH-WESTERN UNION PACKET COMPANY v. CITY OF ST. LOUIS.

1. A city cannot levy a tax in the nature of a tonnage duty upon vessels or commerce, nor can it do so by way of discrimination. But a city, under legislative authority, can lawfully charge reasonable compensation for the use of expensive and artificial conveniences, which a vessel may use at its option; there being ample space elsewhere for it to land within the harbor, where no artificial or expensive improvements have been made.
2. The ordinance of the city of St. Louis prescribing certain wharfage dues at the improved wharves constructed by it, graduated according to the size of the vessel, to be ascertained by its tonnage, is not in conflict with the provisions of the federal constitution in respect to inter-state commerce, nor with the prohibition that "no state shall, without the consent of congress, lay any duty of tonnage."
3. Taxes or dues paid under protest may be recovered back if the taxes or assessments were illegal, and the payment thereof involuntary.

North-Western Union Packet Co. v. St. Louis.

4. Whether the payment of the taxes, under a mere written protest, delivered from time to time, without any process being issued by the city, and where the mode of enforcing the wharfage dues, as prescribed by the ordinance, is by action against the owner or person in charge of the boat, in which it is provided that, if convicted, the judgment shall be a fine in a sum double the amount of wharfage due the city, payment of which fine and costs shall operate as a discharge in full of the demand, is such an involuntary or compulsory payment of the taxes as will give the party so paying the right to recover back the amount, even if the ordinance under which the tax was demanded is illegal—*quære*?

(Before DILLON and TREAT, JJ.)

Tonnage Duty.—Wharfage Dues.—Taxes paid under Protest.

THIS action against the city of St. Louis is to recover back wharfage dues, collected by the city in 1870, 1871, and up to March, 1872, from the plaintiff's boats. The payments were made under "written protest, without waiving the right of the owners of the boats to recover the same from the city by an action at law."

D. D. Duncan and James H. Davidson, for the plaintiff.

E. T. Farish, for the city.

TREAT, J.—This case involves the right of the plaintiff to recover back money paid under protest. Within adjudicated cases, the right of action exists if the taxes or assessments were illegal, and the payment thereof was involuntary.

The main proposition, therefore, requires a determination of the question as to wharfage tax proper—what it is, and where it ends. Under the decisions of the United States supreme court as to *tonnage* duties, regard being had to *dicta* concerning wharfage tax, the rules of law may be thus stated: 1st. The general power of a state to tax *property* must, in its exercise, impose the tax, not on the *tonnage* of the vessel, but on the money value of the vessel. 2d. It is beyond the power of a state or municipality to tax a vessel, foreign or domestic, for the privilege of landing or anchoring in any *port*, whether the tax is upon the

North-Western Union Packet Co. v. St. Louis.

tonnage of the vessel or otherwise. 3d. It is in the power of a municipality, under legislative authority, to exact reasonable wharfage for the privilege of landing at an *improved* wharf, care being had to prevent the municipality from imposing tonnage or other prohibited rates or taxes, under the pretence of collecting wharfage dues. It is very difficult, in the light of adjudicated cases, to draw the precise line, in general terms, between the various classes. The foregoing rules must suffice for a guide.

It appears from the facts agreed that the city claims to be proprietor of most of the river front, a part of which has been improved, graded, and paved by the city, at large cost. Under the supposed authority vested in it by charter, and under ordinances pursuant thereto, it has made many regulations of a police nature, not only as to the parts of the harbor where vessels, rafts, etc., may land, but also as to the safety of the inhabitants dependent upon the character of the cargo—whether explosive, dangerous, etc. It is admitted that, under said regulations, the plaintiff used the *improved* part of said landing, or the so-called wharf, thus artificially made and designated for specific purposes. The rates of wharfage charged were not in all cases a specific sum for a specified time, but a rate dependent on the tonnage of the vessel.

If the city had a right to charge wharfage, then the sole question is, whether it is prohibited from making its rates dependent on the tonnage of the vessel, *eo nomine*, instead of its length, denoting the space it would occupy, or whether the city should fix its rate of wharfage, arbitrarily, upon every craft landing, irrespective of tonnage, size, etc. It would be a narrow view of the question to admit that wharfage is collectible, and to hold at the same time that the *amount* of wharfage dues is not collectible because that amount, though reasonable, is, instead of a sum certain upon every craft, adjusted to the size of the craft, to be ascertained by its tonnage. It may be conceded that no municipality can forbid the entry, anchoring, or landing of a vessel engaged in foreign or inter-state commerce, unless it pays a tonnage duty for said privilege. It must also be held that, when there is ample space for landing within a harbor outside of the improved part

North-Western Union Packet Co. v. St. Louis.

thereof, or wharves, if a vessel is desirous of receiving the benefit of said improvements for the purpose of the extra facilities thereby furnished for mooring safely and conveniently, and loading and unloading cargoes, and also for the accommodation of passengers, said vessel thus availing itself of the extra facilities to secure which the municipality has made large expenditures, should pay therefor a reasonable compensation. The case might be very different if a city, claiming the entire river front, forbade anchoring or landing within its limits without payment of tonnage duty. It could not stop the right to navigate and trade from port to port, but it could lawfully designate, within its police powers, at what part of the port the landing should be made. This might be as important for sanitary as other useful purposes. To hold otherwise would be to decide that the population of every town and city is deprived of the right of self-protection, and is absolutely at the mercy of every vessel which arbitrarily chooses to bring infectious diseases and consequent death with it.

There is a rational limit in all questions of this kind. No city, under pretence of wharfage dues, is permitted, in order to replenish its treasury, to levy a tax in the nature of a tonnage duty upon vessels of commerce; nor can it do so by way of discrimination. Each city under legislative authority, or riparian owner, can lawfully charge a reasonable compensation for the use of expensive and artificial conveniences, which a vessel may use or not at its option, there being ample space elsewhere for it to land within the harbor, where no artificial or expensive improvements have been made. In such instances there is no impediment to commerce—no tonnage or other exactions restrictive upon navigation, but merely facilities furnished, which, if used, ought to be paid for. The vessel is not bound to use such facilities; but if it does, why should it not contribute to the costs and maintenance thereof?

Although the St. Louis ordinance prescribes wharfage dues at the improved wharves by it constructed—graduated according to the size of the vessel, to be ascertained by its tonnage—such

North-Western Union Packet Co. v. St. Louis.

wharfage dues are not tonnage duties within the inhibitions of the constitution.

DILLON, *Circuit Judge*.—1. I concur in the conclusion, and mainly in the reasoning of the foregoing opinion. I have some doubt whether the payment of the taxes, under a mere written protest, delivered from time to time, without any process being issued by the city, and where the mode of enforcing the wharfage dues, as prescribed by ordinance, is by an action against the owner or person in charge of the boat, in which it is provided that, if convicted, the judgment shall be a fine in a sum double the amount of wharfage due the city, payment of which fine and the costs shall operate as a discharge in full of the demand (city harbor ordinance, section 36), is such an involuntary or compulsory payment of the taxes as will give the party so paying the right to recover back the amount, even if the ordinance under which the tax was demanded is illegal. But as the counsel for the city does not press this point in the argument submitted, I pass it without decision—the more readily because the parties evidently desire a determination of the validity of the ordinance, and because the conclusion reached on this subject renders it unnecessary to decide whether the payments were compulsory in such a sense as to give the right to recover them back, if the tax was not legally demandable or enforceable by the city.

2. Part of the river bank in front of the city of St. Louis has been graded, rip-rapped, and macadamized or paved, at “an enormous expense to the city,” for the purpose of affording facilities for the landing, loading and unloading of steamboats at the city. Boats landing within the harbor of the city, but away from the paved or improved wharf, are not required to pay wharfage (ordinance, section 35); but boats landing at the paved and improved wharf are required to pay wharfage dues or tax. Section 28 of the ordinance prescribes the time that “shall be allowed to boats to discharge and take in cargo at the paved wharf, according to their respective tonnage”—i. e., the more tonnage a vessel has, the longer the time allowed to occupy the

North-Western Union Packet Co. v. St. Louis.

wharf. Section 30 of the ordinance, which is attacked by the plaintiff as in conflict with the constitution of the United States, is in these words: "There shall be collected from each and every boat, of whatever kind, except such as are hereinafter excepted, for each and every time the same shall come within the harbor of this city, and land at any wharf or landing, or be made fast thereto, or to any boat thereto fastened, or shall receive or discharge any freight or passengers in this city, five cents for each ton of said boat's burden, by custom-house measurement, *as wharfage dues*: *Provided*, that any boat making regular daily, semi-weekly, tri-weekly, or weekly trips, may pay wharfage dues at a different or special rate, as may be provided by this chapter."

The charter of the city authorizes it "to charge and collect *wharfage and tonnage dues*," and section 30 of this ordinance is not claimed to be invalid, unless it is in conflict with the provisions of the federal constitution in respect to inter-state commerce, and the prohibition that "no state shall, without the consent of congress, lay any duty of tonnage." It may be admitted that the right to the free navigation of the Mississippi river is, under the provisions of the constitution relating to commerce, and the prohibition upon the states to levy duties upon vessels as the vehicles of commercial intercourse (*Steamship Company v. Port Wardens*, 6 Wall. 34, 35), inconsistent with the right of a state absolutely to prohibit steamboats from landing at a city or port without paying for the privilege. The ordinance of the city (section 2) defines the harbor of St. Louis to extend "from the mouth of the Missouri river to the southern boundary of the city." The city has not undertaken to demand of the plaintiff wharfage for all boats landing at any point within its corporate limits. But a city is under no legal obligation to provide, at its own expense, an improved wharf, and to allow all vessels to use the same without compensation. It may be that a city cannot, even under authority from the state, compel vessels to land at its improved wharf, and levy a toll or tax therefor. No such thing has been here attempted. The case before us shows that the city has improved a wharf for the convenience of commerce. It

North-Western Union Packet Co. v. St. Louis.

demand compensation from such boats as saw fit to avail themselves of the improved wharf. The plaintiff's boats voluntarily used this wharf. It is expressly admitted in the stipulated facts "that the several sums demanded and collected by the city are a reasonable compensation, provided the city was entitled to collect any dues from steamboats under the ordinance and laws" in that behalf. Congress has not seen proper to legislate on this subject, and the many provisions of the ordinance of the city of St. Louis "establishing and regulating the harbor department" of the city, show the necessity for regulations in respect to the landing of boats and vessels of all kinds, and the desirableness of appropriate facilities therefor. Unless, therefore, the ordinance of the city provides for a tax or duty on tonnage, it would seem to be free from any constitutional objection.

It requires of boats landing, or making fast to the wharf or landing, or receiving or discharging freights or passengers in the city, to pay five cents for each ton of the boat's burden as wharfage dues. Other sections of the ordinance show that the city does not demand wharfage dues for landing away from the improved wharf; and it is expressly agreed in this case that "the boats of the plaintiff only landed at the improved wharf, where accommodations existed therefor." Under the facts of this case, the words of section 30, requiring wharfage dues from any boat which "shall receive or discharge any freight or passengers in the city," have no application, and it is not necessary to construe them in connection with other parts of the ordinance, nor to affirm their validity.

As the plaintiff voluntarily used the improved wharf for its boats, and as it is admitted that the compensation therefor prescribed in the ordinance is reasonable, I am of opinion that the ordinance is not invalid merely because it fixes and graduates the amount by reference to the tonnage or capacity of the boat. A previous section makes the time which the paved wharf may be used by the boats depend on their tonnage, which is obviously a reasonable provision, and by section 30 the amount of compensation is graduated in the same way. If it appeared that the

North-Western Union Packet Co. v. St. Louis.

city was attempting, under the cover of a wharf tax, to levy duties on the tonnage of vessels, or to exact payment for the mere privilege of landing within the city, its pretensions could not be supported.

Upon the case before us, my judgment is that the city is not liable to pay back the money for which this action is brought.

JUDGMENT FOR DEFENDANT.

NOTE.—The following cases were decided at the same time:

NORTH-WESTERN UNION PACKET COMPANY v. CITY OF LOUISIANA.

By its charter the city of Louisiana has power to erect public wharves and fix the rates of wharfage thereat. The rates of wharfage for steamboats and boats in tow are fixed by section 3 of an ordinance of said city of Louisiana, in relation to the wharf, etc., entitled, "An ordinance in relation to the wharf; regulating the duties of city marshal, *ex-officio* wharf-master, and prescribing and fixing the rates of wharfage," approved February 19, 1867, as follows: "SECTION 3. There shall be charged and collected from each and every steamboat, water-craft, raft, or float, landing at or touching the landing, and delivering or receiving any freight or passengers, within the corporate limits of the city, the following sums as wharfage, to-wit: *First*. All steamboats landing and delivering or receiving freight or passengers, shall be charged and pay as wharfage three dollars for each and every landing, whether ascending or descending."

The action is to recover back wharfage tax paid in 1870, 1871, and 1872, under written protest. The plaintiff's boats used the improved wharf made by the city. If the tax is legal, it is admitted that the amount is reasonable.

Duncan & Davidson, for the plaintiff.

Dyer & Emmons, for the defendant.

TREAT, J.—The ordinance of the city of Louisiana covers *the entire corporate limits* of that city; and if the plaintiff had paid the so-called wharfage for landing where there was no artificial or improved wharf, there might be ground of complaint. But the fact is that the plaintiff's boats chose to take the benefit of the improved wharf, built at the expense of the city, when it was well known what compensation was required for such use. The rates were not made dependent on tonnage.

DILLON, Circuit Judge, concurs.

JUDGMENT FOR DEFENDANT.

North-Western Union Packet Co. v. St. Louis.

SAME v. THE CITY OF CLARKSVILLE.

TREAT, J.—The same ruling must obtain as in the case of the city of Louisiana, it being agreed that the facts are substantially the same.

DILLON, Circuit Judge, concurs.

JUDGMENT FOR DEFENDANT.

SAME v. THE CITY OF HANNIBAL.

Duncan & Davidson, for the plaintiff.

Thomas H. Bacon, for the defendant.

TREAT, J. — The ordinance of the city of Hannibal provides for wharfage at rates to be determined by tonnage, for every landing of a steamboat, etc., and by the time the steamboat continues at the landing. The remarks made in the suit against the city of St. Louis cover this case. There is a doubtful provision in the ordinance, perhaps, concerning the anchoring at the landing for barges, etc., but no question in this case arises under that provision.

DILLON, Circuit Judge, concurs.

JUDGMENT FOR DEFENDANT.

In the *City of Keokuk v. Keokuk Northern Line Packet Co.* December term, 1876 (45 Iowa Rep. 196, S. C. 4 Cent. Law Jour. 276, with note), the supreme court of Iowa ruled the following points:

1. TAX UPON COMMERCE—WHARFAGE FEES—WHEN CONSTITUTIONAL.—The constitution and laws of the United States prohibit the levying of taxes upon the commerce of the country, in the way of duties upon exports and imports and imposts upon vessels engaged in commerce. Whatever may be regarded as taxes of this character or may abridge the free use of the Mississippi, is unconstitutional. But a city is not prevented from charging a reasonable compensation for the use of wharves erected by it for the convenience of commerce. A municipal ordinance, which provides for wharfage fees which are not excessive, cannot be regarded as a regulation affecting prejudicially the interests of commerce or freedom of the river upon which the wharves are constructed. Such wharfage fees are not to be regarded as a tax; they are levied as a compensation for the use of the wharves.

2. That the wharfage fees are graduated by the tonnage of the vessels, does not affect the rule that a city may charge a reasonable compensation for the use of its wharves.

3. WHAT IS A WHARF—JUDICIAL NOTICE.—A street paved and extending into the river is none the less a wharf. The court will take judicial notice that the wharves of the Mississippi are constructed in this manner.

4. The defense that the fees are excessive must be specially pleaded.

Chaffin v. St. Louis.

5. **WHEN FEES VALID—JUST COMPENSATION.**—If fees be authorized by a municipality on commerce, etc., amounting to a tax upon commerce and beyond just compensation for the use of improved wharves, they cannot be collected. To be valid, they must be within the limits of just compensation.

6. **POLICE POWERS OF MUNICIPALITY—REGULATION OF BOATS.**—A municipality in the exercise of its police powers may control the landing of boats by designating the place where they shall receive or discharge freight or passengers, and charge a reasonable compensation therefor.

7. **CONSTRUCTION OF STATUTES.**—Statutes partly in conflict with the constitution will be held void only as to those parts which are unconstitutional. This rule is extended to the case of a statute or ordinance authorizing two or more acts, one of which is within and the other without legislative authority.

The judgment of the supreme court of Iowa on the constitutionality of the ordinance was affirmed by the supreme court of the United States at the October term, 1877 (5 Cent. Law Jour. 504, S. C. 5 Otto, 80).

As to recovery back of wharfage taxes paid under a void ordinance: See *Kyle Steamboat Co. v. New Orleans* (U. S. circuit court, Louisiana, before BILLINGS, J.), 23 Int. Rev. Record, 19; Dillon, Munic. Corp. sec. 751; 4 Cent. Law Jour. 280, note, and cases cited.

EDWIN CHAFFIN v. THE CITY OF ST. LOUIS *et al.*

The federal courts are prohibited, except in certain cases in bankruptcy, from granting "the writ of injunction to stay proceedings in any court of a state" (Rev. Stats. sec. 720); and in this case such injunction was refused at the instance of a stockholder in a corporation where the state court had determined the questions sought to be litigated in a suit against the stockholder's corporation, without objection from the stockholders.

(Before DILLON, Circuit Judge, at Chambers, December 18, 1876.)

Injunction to Stay Proceedings in a Court of a State.—Corporations.—Suit by Stockholder.

ON MOTION FOR A TEMPORARY INJUNCTION. Edwin Chaffin, a citizen of the state of Massachusetts, and the owner of one hundred and twenty-five shares of the capital stock of the St. Louis Gas Light Company, files his bill of complaint on

Chaffin v. St. Louis.

behalf of himself and all other stockholders of said company against the city of St. Louis, the St. Louis Gas Light Company, and each of the directors thereof, as also the Laclede Gas Light Company.

The bill purports to be brought for the purpose of removing a cloud upon the title of defendant to his stock in the St. Louis Gas Light Company, which has been created and caused, as is alleged, by the unlawful and unauthorized acts of the directors of the company in making and entering into two certain contracts, dated, respectively, 1846 and 1873, as also for an injunction to prevent further threatened injury by the recognition of those contracts by the directors of said company—the first with the city of St. Louis, and the other a tripartite contract between the St. Louis Gas Light Company, the city of St. Louis, and the Laclede Gas Light Company.

The relief sought is the cancellation by decree of court of the alleged illegal and unauthorized contracts, as also the restraining of defendants, during the pendency of this suit, from doing any further acts prejudicial to complainant's interest, or making further claim to any rights under said illegal contracts, and particularly to restrain the directors from in any manner recognizing or ratifying the illegal contracts heretofore made, or from making settlements based thereon, and that the Laclede Gas Light Company be restrained from exercising any of the rights or privileges claimed by it under said "tripartite agreement" of 1873; as also that the city of St. Louis be restrained and enjoined from further claiming rights or title under said pretended contracts until this suit is heard and determined.

Frank J. Bowman and *James O. Broadhead*, for the motion.

Leverett Bell, *contra*.

DILLON, *Circuit Judge*.—This cause is before me on a motion by the complainant, a single stockholder in the St. Louis Gas Light Company, for a temporary injunction. On a preliminary application of this character, it is not advisable to express any

Chaffin v. St. Louis.

opinion upon the rights of the city or of either of the gas companies, except so far as may be necessary to decide the application. It appears from the bill and exhibits, that in 1870 the city of St. Louis, as plaintiff, commenced a suit in the St. Louis county circuit court against the St. Louis Gas Light Company, to enforce, *inter alia*, an alleged right to purchase the works and property of that company, under the charter thereof, and the fifth clause of the contract between the city and the gas company, dated January 9th, 1846, which clause undertook to give to the city the right to make such purchase beyond the end of twenty-five years from January 1st, 1840, viz: at the end of every five years thereafter.

On the 28th of February, 1873, the so-called tripartite agreement was made between the city and the two gas companies, which undertook to settle and compromise their respective disputes—dividing the territory to be lighted between the two gas companies, and containing stipulations as to furnishing the city with gas, and the price thereof, until January 1st, 1890, if the said gas companies shall so long exist. This contract also contained an agreement between the city and the St. Louis Gas Light Company that the litigation between them shall cease, and all suits pending between them are to be dismissed, and all causes of action between them be considered settled.

Afterwards an amended and supplemental bill was filed by the city against each of the companies, still seeking to enforce its right to purchase the property of the St. Louis Gas Light Company, and insisting upon the validity of the contract in that respect made in 1846, and upon the invalidity of the tripartite agreement of 1873.

The Laclede Gas Light Company answered, insisting upon the validity of the contract of 1873, under which it had acted and expended large sums of money. The answer of the St. Louis Gas Light Company denied the validity of the above mentioned fifth clause of the contract of 1846, giving the city the right to purchase beyond the year 1865, and insisted upon the validity and binding force of the compromise contract of 1873. On the

Chaffin v. St. Louis.

1st day of June, 1876, an interlocutory decree was entered in the suit by the state court, holding that the contract of 1846 was valid and the contract of 1873 was not binding or effectual to defeat the right of the city to purchase the property and works of the gas company.

That court accordingly decreed a specific performance of the contract of 1846; that is, decreed that the city had the right to purchase the property and works of the company, appointed commissioners to ascertain the value, placed the property in the hands of a receiver, and perpetually enjoined the St. Louis Gas Light Company from manufacturing or selling gas in St. Louis.

Now, after all this had been done, the complainant herein, Mr. Edward Chaffin, in the right of a stockholder in the St. Louis Gas Light Company, filed the present bill in the circuit court of the United States against the city, and the Laclede company and his own company and the directors thereof, the prayer of which appears in the statement of the case.

Without pronouncing upon the validity of the contracts of 1846 and 1873, there are several reasons why the injunction asked cannot be allowed :

1. The plaintiff does not inform us when he became the owner of his stock, nor show that he has not, all along, been aware of the proceedings in the state court, and just what was being done and omitted to be done therein. By the answer his company denied the right of the city to enforce the purchase, and there is no evidence before me that the directors did not resist to the best of their ability the claim of the city to enforce a purchase of the property. On the plainest principles, a stockholder who stands by, awaiting the result of a litigation, cannot, on that result proving unfavorable to his company, draw the litigation into another court in a suit between himself and the litigants in the state court. If such a rule had its foundation in the law, there would be no end to a suit against a private corporation, so long as any one or more stockholders should see fit to re-litigate the same controversy in their own names.

So far as an injunction is sought on the ground that the direc-

Chaffin v. St. Louis.

tors of the St. Louis Gas Light Company did not resist the right of the city to make a compulsory purchase of its works and property, it is not sustained by the record of the cause, so far as it has been called to my attention.

It is also urged as a ground for the injunction, that the directors ought to have insisted in the state court that the contract of 1873 was invalid, whereas, in the answer filed, they maintained its validity. However this may be as to the duty of the directors, it is plain that no injury has been wrought thereby to the complainant, for the state court decreed in this regard in accordance with the view for which the complainant contends.

2. The complainant has amended his prayer for an injunction by striking out the words which ask that the city be enjoined "from further prosecuting its said suit" in the state court, but notwithstanding this, it is evident that to grant the injunction sought, would, if it were effectual for any purpose, be so only because it would in some way interfere with the progress of the litigation in that court. This a federal court is prohibited from doing directly, for the Revised Statutes of the United States (section 720) enact that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state." And on the case made by the bill, it is not justified in doing this indirectly, at the instance of a stockholder. (*Memphis v. Dean*, 8 Wall. 64; *Peck v. Jenness*, 7 How. 612.) The motion for the allowance of a provisional injunction is denied.

MOTION DENIED.

Chaffin v. St. Louis.

CHAFFIN v. CITY OF ST. LOUIS.

The United States circuit court will not entertain a bill in equity by a non-resident stockholder of a domestic corporation, where it appears that the issues raised by the bill have been already adjudicated in a suit brought in the state court between the corporation and the proper adversary parties, and litigated there without fraud or collusion.

(Before DILLON, Circuit Judge.)

Jurisdiction of United States Circuit Court.—Stockholder's Bill.

THIS is a bill in equity by complainant, a citizen of Massachusetts, and the owner of one hundred and twenty-five shares of capital stock in the St. Louis Gas Light Company, on his own behalf and that of other stockholders who may join him, against the St. Louis Gas Light Company and the directors thereof, and the Laclede Gas Light Company, and the city of St. Louis, to procure the cancellation of certain contracts, to which said corporations are parties. (*Ante*, p. 19.)

The amended bill of complaint states that, under the charter of the St. Louis Gas Light Company, the city was entitled to purchase the works, etc., of the said company, at a price to be determined by arbitrators, in 1860 and 1865, if it elected at either of said times so to do; and that by a contract between the city and the company, of January 9th, 1846, the city relinquished its right to purchase in 1860; and said contract thereupon further provided that if the city should not exercise its right to purchase in 1865, it might purchase in 1870, in the same manner and to the same effect as is provided in the charter; and it is charged that said contract is and was invalid, illegal, void, and of no binding force, etc.

It is further alleged that in 1870 the city instituted an action in the circuit court of St. Louis county, to enforce said contract and acquire said works, etc., thereunder, and that the directors of the St. Louis Gas Light Company did not properly and in good faith defend said action, and that during its pendency, in

Chaffin v. St. Louis.

1873, another contract was entered into between the city and the gas light companies, which was also illegal and void, and that said suit resulted adversely to the St. Louis Gas Light Company, and thereby, and by said illegal contracts, said complainant's shares of stock therein have suffered great depreciation in value, and, as against the city, it is prayed that said contracts of 1846 and 1873 be declared void and be cancelled, and that the city be enjoined from claiming or exercising any rights thereunder.

The separate answer of the city of St. Louis, to which exceptions have been taken and are now urged, is as follows :

"And further answering, said defendant says that on the 21st day of May, 1870, the city of St. Louis instituted an action in the circuit court of St. Louis county (being the suit mentioned in the amended bill herein), against the St. Louis Gas Light Company, for a specific performance of said contract of January 9th, 1846, which said action was entitled: The City of St. Louis, plaintiff, against the St. Louis Gas Light Company, defendant; and said St. Louis Gas Light Company duly appeared in said action, and defended the same, and alleged in its answer to plaintiff's petition therein, that said contract of January 9th, 1846, was invalid, for the same reasons now herein urged by complainant in his amended bill of complaint; that said suit was proceeded with in said county; and thereafter, upon August 4th, 1875, the Laclede Gas Light Company was joined as a party defendant therein, and thereupon it also appeared by counsel and defended; that said suit was thereafter duly tried and heard by said court upon evidence and witnesses adduced and heard on the part of plaintiff herein, the city of St. Louis; also on the part of said St. Louis Gas Light Company and said Laclede Gas Light Company; and such further proceedings were had therein, that, on June 1st, 1876, an interlocutory decree was rendered in said cause by said court, in which it was, amongst other things, adjudged and decreed by said court that said contract of January 9th, 1846, was and is a valid and lawful contract, and binding upon the St. Louis Gas Light Company; and said gas light company was forever enjoined and restrained

Chaffin v. St. Louis.

from manufacturing or selling gas in the city of St. Louis, or its suburbs, or prosecuting the business of a gas light company; and a receiver was appointed of all the property and effects of said gas light company; and said receiver thereafter duly entered into the possession of the same, and now holds the same, and is manufacturing and selling gas in St. Louis, under the order and direction of said court; that further proceedings being had, a final decree in said cause was entered on the 12th day of February, 1877; that thereupon the said St. Louis Gas Light Company filed a motion for a new trial and for a rehearing in said cause; which motion is now pending and undetermined in said court.

“And herewith is presented and filed a certified copy of the original petition in said cause, the answer of the St. Louis Gas Light Company thereto—to amended and supplemental petition of plaintiff therein; the demurrer of the St. Louis Gas Light Company thereto; also the demurrer of the Laclede Gas Light Company, and a judgment of said court overruling said demurrers; the answer of the St. Louis Gas Light Company; and the replications of the city of St. Louis thereto; the interlocutory decree of June 1st, 1876, therein; and the final decree of February 12th, 1877.

“And said defendant alleges that said cause—so instituted as aforesaid in the circuit court of St. Louis county—is still pending in said court; and that the same identical matters, questions, and issues were presented for trial, adjudication, and determination in said case, in said circuit court of St. Louis county, as are here presented for trial, adjudication, and determination, to this honorable court, by the amended bill of complainant herein; that said circuit court of St. Louis county had full, ample, and complete jurisdiction to hear and determine said matters, questions, and issues, and each and all of them, in said case; and that it did hear and determine the same, and all of them, and perpetually enjoin the St. Louis Gas Light Company from manufacturing and selling gas in St. Louis; that the said St. Louis Gas Light Company is now bound by said injunction, and subject to

Chaffin v. St. Louis.

the further order of said circuit court of St. Louis county in said cause; that the St. Louis Gas Light Company and the directors thereof, in good faith, defended said action in the circuit court of St. Louis county, by counsel learned in the law, duly employed by them for that purpose, and they are now defending the same; that the proceedings, orders, and judgments of said circuit court of St. Louis county in said cause are now in full force, and unreversed, and binding upon the St. Louis Gas Light Company, its directors and stockholders, including the complainant herein, if he be a stockholder, as alleged in his amended bill of complaint."

A certified copy of the record, including the proceedings, pleadings, and decrees in said cause in the state court, is filed with the answer as an exhibit.

The complainant excepts to the above parts of said answer, on the ground that they fail to state facts sufficient to constitute a legal defense to his amended bill of complaint; and the questions presented by said exceptions are now here to be determined.

F. J. Bowman, for the plaintiff.

L. Bell and *E. T. Farish*, for the city of St. Louis.

DILLON, *Circuit Judge*.—The answer sets up the suit of the city of St. Louis, commenced in May, 1870, in the state court, against the St. Louis Gas Light Company (in which the present plaintiff is a stockholder), to enforce the right of the city to purchase the works and property of the gas company, conferred by the legislature of the state in that behalf, and by the contract of January 9th, 1846. This alleged right of the city to make such purchase was denied by the gas company, and the record of that suit shows that such right was vigorously resisted at every step of the progress of that suit. After a hearing on the merits, that court, June 1st, 1876, entered an interlocutory decree declaring that the contract of January 9th, 1846, was valid, and that the city had the right to purchase the works and property of the gas light company; and afterwards, on the 12th day of February, a final decree

Chaffin v. St. Louis.

was rendered effectuating such right, and declaring that all the estate, interest, and claim of the gas light company to its works and property be vested in the city of St. Louis; which decree is alleged in the answer to be in full force and unreversed. The present suit by a stockholder in the said gas light company was brought in this court November 23d, 1876, which was after the interlocutory decree above mentioned was rendered in the state court.

One of the main objects of the present bill is to have the contract of January 9th, 1846, declared null and void as respects the gas light company. But the state court having jurisdiction of the suit of the city against the gas light company, upon pleadings presenting that precise issue, has judicially determined that said contract, in the respect here involved, was a valid contract, and the answer which pleads this decree avers that the gas light company and the directors in good faith defended said action in the state court, and are now defending the same, and further avers that the decree in the said suit, which is in full force, is binding upon the gas light company, its directors and stockholders, including the complainant. A decree thus rendered upon adverse proceedings, and without fraud and collusion, is binding upon the gas light company, and upon its stockholders; and the latter cannot, as we said when the injunction asked for was denied, afterwards draw the litigation into a federal court in a suit between themselves and the litigants in the state court. If this could be done, there would be no end to a suit against a private corporation so long as any stockholder should see fit to re-litigate the same controversy in his own name.

The exceptions to the answer are disallowed.

ORDERED ACCORDINGLY.

St. Louis National Bank v. Papin.

ST. LOUIS NATIONAL BANK v. PAPIN; NATIONAL BANK OF MISSOURI v. SAME; THIRD NATIONAL BANK v. SAME; FOURTH NATIONAL BANK v. SAME; VALLEY NATIONAL BANK v. SAME; MERCHANTS' NATIONAL BANK v. SAME.

1. Shares in banks being taxable and no excessive valuation being complained of, equity will not restrain the collection of the taxes, though the assessing officers may have arrived at a correct result by some erroneous method.
2. Where an act of the legislature is susceptible of two interpretations, one of which will overthrow the act or make it unconstitutional, and the other will support the act and give it effect, the latter is to be adopted by the judicial branch of the government. This principle is one which commends itself to the federal courts with great force, in all cases where they are called upon to expound and apply state legislation, and especially so where they are asked to overthrow the revenue laws of the states.
3. By the section of the national banking act (Rev. Stats. section 5219) which permits the states to authorize all the shares held in national banks by any person, to be included in the valuation of his personal property, and to be assessed at the place where the national bank is located, subject to the restriction "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals," congress has limited the states to taxation upon the shares in national banks as distinguished from taxation of the banks *eo nomine* upon their property or capital. A state cannot evade the restrictions of the act by requiring the value of the property of the bank to be added to the value of the shares otherwise ascertained, and thus produce an unfavorable discrimination in the taxation of bank shares.
4. As regards national banks, section 35 of the revenue act of 1872 of Missouri may be construed as intended to impose a tax upon the shares only in such banks at their actual cash value, to be estimated by the taxing officers upon an inquiry *inter alia* into the actual value of the property of the banks, so far as it imparts a value to the shares.

(Before DILLON and TREAT, JJ.)

Taxation of Shares of National Banks.—Revised Statutes, Section 5219.

THE national banking act permits the states to authorize all the shares held in national banks by any person to be included in

St. Louis National Bank *v.* Papin.

the valuation of his personal property, and to be assessed at the place where the national bank is located, subject to the restriction (the only one here involved) that such shares shall not be taxed "at a greater rate than is assessed upon other moneyed capital in the hands of individuals." (Rev. Stats. sec. 5219.) The constitution of Missouri requires all property to be taxed in proportion to its value. In the revenue act of the state of Missouri, approved March 30, 1872 (Wag. Stats. chap. 118), are the following provisions in respect to the taxation of property and shares in corporations.

Section 35 of this act provides as follows:

"Persons owning shares of stock in banks or any joint stock institution or association doing a banking business, or any insurance company, whether fire, marine, life, health, accident, or other insurance, incorporated under or by any law of the United States or of this state, are not required to deliver to the assessor a list thereof; but the president or other chief officers of such corporation shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the names of the persons who hold the same, and shall also state the actual cash value of such stock and all the property belonging to such corporation. In estimating the value of such stock and property, the officer making the same shall estimate and include all reserve funds, undivided profits, premiums, or earnings, and all other values belonging to such corporation, which cash value shall be assessed and taxed as other personal property. Insurance companies, or any corporations doing business on the mutual plan, without capital stock, shall make like returns of the net value of all assets or values belonging thereto, which net value shall be assessed and taxed in like manner; private bankers, brokers, money brokers, and exchange dealers shall in like manner make returns of all moneys or values of any description invested in, or used in, their business, which shall be taxed as other personal property."

Section 36: "The taxes assessed on shares of stock embraced in such list shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so

St. Louis National Bank v. Papin.

paid by them, or deduct the same from the dividends accruing on such shares, and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made."

Sections 37, 118, and 120 of the act refer to the mode of proceeding to collect the taxes, and penalties for non-compliance with its provisions.

Six of the national banks located in St. Louis brought in this court bills in equity for an injunction to restrain the collection of taxes amounting to \$158,772.53, levied for the year 1875, under the authority of the revenue laws of the state, upon the shares of the respective shareholders of the said banks. Answers were filed and proofs taken, and the cases were argued and submitted together.

James O. Broadhead, Henry Hitchcock, Noble & Orrick, and M. B. Jonas, for the plaintiffs.

F. J. Bowman, Samuel Reber, and G. A. Madill, for the defendant.

DILLON, *Circuit Judge*.—The bills do not allege that the state has taxed or attempted to assess any tax against any of the banks *eo nomine* in respect of property (other than real estate) owned by them in their corporate capacity. The only tax assessed by the state or under its authority, except a tax on the real estate, of which no complaint is made, is a tax upon the shares of the shareholders. It is not alleged in the bills, as a ground for injunction or relief, that the shares have in fact been valued for taxation at more than their actual cash value.

But the special ground of complaint is that the taxes in question are not authorized, and if authorized, are authorized by section 35 of the revenue act of 1872, above quoted, and that that section prescribes a mode of ascertaining and fixing the valuation of the shares (which mode the taxing officers of the state are bound to follow) in conflict with the permission given in the national banking act to the states to tax the shares, and

St. Louis National Bank v. Papin.

which, if carried out, as it must be if any taxes whatever are levied under it, results necessarily, as contended, in taxing these shares more than the other moneyed capital in the state is taxed, thus at once contravening the restriction in this respect contained in the act of congress, and the provision as to equality of taxation contained in the constitution of the state.

It is contended by the counsel for the banks that by section 35 of the revenue act of 1872, above given, the legislature has provided for taxing the shareholders not only upon the value of their shares as such, but, in addition to this, for taxing them through their shares upon all the property of the bank, by commanding the taxing officers to "include" the value of all such property in the valuation of the shares.

It is probably a sound view of the federal legislation, as it stands (Rev. Stats. sec. 5219), that congress has limited the states to taxation upon the shares in national banks, as distinguished from taxation of the banks *eo nomine* upon their property or capital, and if so, the states could not evade the restrictions of the act of congress by requiring the value of the property of the bank to be added to the value of the shares otherwise ascertained, and thus produce an unfavorable discrimination in the taxation of bank shares. The question is, whether the legislature of Missouri has done what the counsel for the banks assert.

It must be admitted that the language of section 35 is not free from obscurity, and that has been quite manifest upon the argument before us, since it showed that the counsel for the defendant have put different constructions upon it. In reaching a conclusion, the court must bear in mind certain established principles of construction. One is, that where an act of the legislature is susceptible of two interpretations, one of which will overthrow the act or make it unconstitutional, and the other will support the act and give it effect, the latter is to be adopted by the judicial branch of the government. This principle is one that commends itself to the federal courts with great force, in all cases where they are called upon to expound and apply state legislation, and with more than ordinary persuasiveness in cases

St. Louis National Bank v. Papin.

in which these courts are asked to overthrow the revenue law of the states.

The court is of opinion that section 35, in respect of the valuation of the shares in national banks, does not necessarily require the construction which the banks put upon it; that is to say, it does not require the value of the property of the bank as a corporate entity to be added to the value of the shares, and the whole to be divided by the number of shares, the quotient giving the value of each share. But its requirement is to ascertain and tax the share at its actual cash value; but in ascertaining that value, the officer is directed to regard and include in his estimate all reserve funds, profits, earnings, and other values. Why not? These are important elements in the question of value, and they should be included in estimating the value of the stock. From these, indeed, the stock derives its principal pecuniary value. Suppose the direction to the taxing officers was to assess the shares at their cash value, without prescribing how that value should be ascertained. The cash value may be more or less than the par value, or more or less than the market value. The actual value of shares depends chiefly upon the capital, property, and values owned by the bank. Any intelligent determination of the value of a share involves an inquiry into the assets and property of the bank.

The act did not intend to make the estimate of value fixed by the president of the bank conclusive. The duty of estimating the value is devolved on the officers of the state; and as respects national banks, the provision requiring the president of the bank to return the property of the bank and state its value, can and should be regarded as intended to supply the assessing officer with data to form a just and fair judgment as to the actual value of the shares. To this end, and to preclude controversy, the act directs "reserve funds, undivided profits, premiums or earnings, or other values belonging to the corporations," to be included in estimating the value of the shares. It does not seem to us that the act excludes from the consideration of the assessor the liabilities of the bank, since these must be taken into account, if the

St. Louis National Bank v. Papin.

“actual cash value” of the stock and no more is to be ascertained and taxed. This view is confirmed by the next sentence, which requires corporations on the mutual plan to “make like returns of the net value”—which would allow liabilities to be regarded in ascertaining the value of the assets to be taxed.

We do not think a fair construction of section 35 requires the assessing officers to exclude from their consideration the liabilities and actual instead of nominal value of the assets of the bank, in ascertaining the taxable value of the property of the bank, as one means of arriving at the value of the shares.

As respects national banks, our judgment is that the act of the legislature can be fairly construed as intended to impose a tax upon the shares only in national banks at their actual cash value; that such cash value is to be estimated by the taxing officers upon an inquiry, *inter alia*, into the actual value of the property of the banks, so far as this imparts or confers a value upon the shares, and that this is the purpose which should be judicially ascribed to the legislature, rather than a purpose to impose taxes upon an illegal valuation. The proofs do not show that the valuation of the shares by the taxing officers is excessive; at all events, an excessive valuation in fact is not made a ground of relief in the bills. Inasmuch as the shares are taxable and no excessive valuation is complained of, equity would not restrain the collection of the taxes, even though the assessing officers may have arrived at a correct result by some erroneous method.

A decree will be entered in each case dismissing the bill of complaint.

TREAT, J., concurs.

DECREE ACCORDINGLY.

NOTE.—This decision was acquiesced in by the banks, and the taxes assessed against them were paid.

Paul v. Pacific Railroad Company.

PAUL v. PACIFIC RAILROAD COMPANY *et al.*; PARMELY v. IRON MOUNTAIN RAILROAD COMPANY; BAILEY v. ATLANTIC AND PACIFIC RAILROAD COMPANY.

1. A statute of Missouri provided that the state board of equalization "shall proceed to adjust and equalize the aggregate valuation of the property of each one of the railroad companies liable to taxation under the provisions of this act:" *Held*, that this only authorized the board to equalize the aggregate valuation of the county boards, and did not give them power to act as an original assessing body, and make an assessment *de novo*.
2. Although to make an assessment *de novo* would be an act beyond the power of the board, and void, this would not vitiate the entire tax, but would leave the final valuation as fixed by the county boards.
3. The companies were required to pay taxes on the valuation fixed by the county boards, and the collecting officers were enjoined only in respect of the excess over such valuation.
4. A mere error of judgment on the part of the assessing officers, as to the valuation of property, is not, in the absence of fraud, subject to judicial revision. The charge of fraud made against the state board of equalization not sustained by the proofs.

• (Before DILLON and TREAT, JJ.)

Powers of Missouri State Board of Equalization.—Effect of Acting "ultra vires."—Over-valuation of Property.—Injunction against Collection of Illegal Taxes.

THESE bills in equity were filed for an injunction and relief against taxes assessed for the year 1873, upon the property of the Pacific and certain other railroads in the state of Missouri. Temporary injunctions were allowed on certain conditions, for reasons which were stated at the time, and which will be seen by a report of the cases in 3 Dillon, pp. 13–25.

The issues having been made up, and the proofs taken, the causes were submitted for final decrees.

Mr. Baker, Mr. Lowe, Mr. Dryden, Mr. Sears, and others, for the plaintiffs.

Mr. Bowman, and others, for the counties.

Paul v. Pacific Railroad Company.

DILLON, *Circuit Judge*, in disposing of the cases, delivered an oral opinion, substantially as follows :

These cases concerning railroad taxes, which we have had before us for some time, were, at the outset, and perhaps are still, very important.

Bills were originally presented to me for the granting of temporary injunctions. After hearing the parties, I allowed temporary injunctions until the term when the supreme court justice allotted to this circuit—Mr. Justice MILLER—was to be here, at which time we had a very full argument before all three of us, Judge TREAT sitting at our request. It is not necessary to go into all that was said and done at that time. The result of it was this: That, after hearing the counsel fully for two or three days on each side, we made our order, requiring these companies to pay what amounted to about sixty per cent of the taxes which were claimed against them, meanwhile continuing the temporary injunctions, but with a provision that if this amount was not paid the injunctions should stand dissolved, leaving the state and the various counties and municipalities free to use the ordinary remedies for the collection of their taxes. (3 Dillon, pp. 13, 25.) In respect of the Atlantic and Pacific and the Missouri Pacific railroads, there were special grounds of exemption from taxation claimed, on which the court ruled against them, leaving the cases against those companies and the other companies to stand on ground common to all, as far as they could stand at all. The views which the court took of those special exemptions have, since that time, been settled by the United States supreme court, in conformity with our judgment against the companies, to the effect that they have no special legislative contract for exemption from the particular taxes here in controversy.

The main ground-work of the bills was the alleged fraudulent conduct of the state board of equalization, and also the alleged attempt of that board to exercise powers not conferred upon it by the statute. The companies also complained loudly of the excessive nature of these assessments.

In this state each railroad company is required to make a list

Paul v. Pacific Railroad Company.

of its property, and to affix a value to it. These lists are transmitted to the counties, and there is a county board established, whose duty it is "to examine the statement furnished them by the officers of the company, and *determine* the correctness thereof, as to the amount of property and the *valuation thereof*." The companies complied with this provision, and transmitted their descriptive lists and their valuation to the various counties. In some instances the valuations were accepted by the counties, but in most cases they were raised, as, for example, in the case of Pettis county. The value of the railroad property in that county, as returned by the officers of the company, amounted to \$300,260; as increased by the county court, it amounted to \$533,000—nearly double; and, in general, the counties went over those lists returned by the companies, and very largely increased the specific valuations, and the aggregate amounts returned. Another provision of the law is that this valuation, as fixed by the county court, shall be transmitted to the central authority, at Jefferson City, that is, to the state board of equalization; and that board, for the year the taxes of which are in dispute here, was constituted of the state senate. Now, the result of the action of that body was very largely to increase the valuations fixed by the county courts; and the printed record of their proceedings shows that they conceived it to be their duty to investigate this matter very fully, and to examine witnesses. The result was that they increased largely the valuations. In the case of the Missouri, Kansas, and Texas Railroad, the valuation was increased from \$8,000 or \$9,000 a mile to \$26,000 a mile. The bill alleged that this valuation was largely over what it had ever been before; that although the condition of the property was nearly the same, the assessment was double, in round numbers, what it was the preceding year; and a supplemental showing has been made to the effect that it was double what it was the next year; and that altogether this is a very extraordinary and most exceptional valuation, without anything like it before or since. The railroad companies imputed this in their bills to a disposition, intention, and purpose, on the part of the senate, acting as a state board of

Paul v. Pacific Railroad Company.

equalization, to discriminate against property of this class, and to make it bear, in violation of the constitution of the state, more than its proportionate share of the public burdens. A great deal of evidence has been produced here for the purpose of showing that, in general, other property throughout the state is valued at from fifty to sixty or sixty-six per cent of its actual value, whereas the valuation placed by the state board of equalization on this railroad property is not only equal to, but in excess of, its full value, and the distinct charge is made in the bill that this was done from a premeditated design to make this property contribute more than its share of the public burdens.

A large amount of evidence has been taken on that point. We have gone over that evidence, and while we cannot say that the result is, in our minds, quite clear that these valuations, relatively considered, are not excessive, yet we are of opinion that a mere error in judgment, on the part of any body of this kind, in fixing the valuation of property, is not subject to judicial revision or control; and if the bill could rest on no other ground it would have to be dismissed. In other words, the charge of fraud, which is made against this body, is not sustained.

That leaves simply a question whether this body was acting in excess of the rightful jurisdiction conferred upon it by the statute. The claim on the part of the complainant is that the statute then in force—for in this regard it has since been amended, and the same question cannot again arise—created the state board of equalization, with only the power to *equalize* taxes, that is, to *equalize the aggregate valuation*. It is acknowledged that they have the power to do that, but it is denied that the statute gave them the power to act as an *original assessing* body, to go over all the railroads of the state and ascertain their property, and make an original assessment, *de novo*, based on the value of the specific articles which compose the property of these companies.

Now, it is a question of law as to what powers were conferred on that body by the statute of 1873. The question of fact is whether, if that body had only the powers of a board of equal-

Paul v. Pacific Railroad Company.

ization, they undertook to exercise the powers of an assessing body. The statute is this: "The said board shall proceed to adjust and equalize the aggregate valuation of the property of each one of the railroad companies, liable to taxation, under the provisions of this act,"—"*shall proceed to adjust and equalize the aggregate valuation.*" "The board shall have power to summon witnesses, by process issued to any officer authorized to serve subpoenas, and shall have the power of a circuit court to compel the attendance of such witnesses, and compel them to testify; they shall have power to increase or reduce the *aggregate valuation* of the property of any railroad company included in the statements or returns made by the railroad companies and clerks of the county courts, and any other property belonging to said railroad companies which may be otherwise known to them, as they may deem just and right."

Since that time a statute has been passed by the legislature of Missouri inserting, in addition to these words, the power to "assess," but that statute has no relation to this controversy. This question was very elaborately argued before the full bench when Mr. Justice MILLER was here, and although, I believe, nothing very positive was stated about it in the remarks which were made, and no definite conclusion was announced, we reached quite a satisfactory one, which was that the law limited the functions and powers of this body to the work of *equalizing*, and that they had not the functions and powers of an original assessing body; and upon further reflection, that is still our judgment. This makes it necessary to consider whether what the state board of equalization did was an adjustment and equalization of values, or whether it was an original assessment. Judge TREAT and myself have gone through the evidence in this respect and have not reached a conclusion exactly in accord. Judge TREAT is of opinion that what they did can be reconciled with a fair view of simply adjusting and equalizing the aggregate valuations. I am of opinion, taking the whole of that evidence together, that this body undertook to make, and did make, a specific assessment of this property—undertook to inquire originally, and did inquire

Paul v. Pacific Railroad Company.

originally, into the value of each locomotive, sleeping car and freight car, the value of lands and of all specific property, just as fully and completely as they could have done had they been undertaking to assess it originally; and, indeed, while this is charged in the bill, the answer hardly denies it, but, on the contrary, asserts in terms, whether meant to do so or not, that they did *assess* it, and that their assessment was just. So, taking the pleadings and the proofs together, I am of opinion that they did undertake to make, and did make, an original assessment.

Now, this being so, what is the result of it? The result is that they were acting *ultra vires*. It was contended on the argument before us, by the companies, that this would have the effect of vitiating the entire assessment, and that no tax at all could be collected, and it has since been pressed upon us that that is the true view of the matter; but *that* was settled at the other argument. We held then, under the circumstances of the case, that this did not have the effect to vitiate the whole proceeding, but that, if they undertook to do what they had no authority to do, it would be just the same as if they had not done it at all; that the valuations as fixed by the county courts would be the true valuations in the premises, and that these companies must pay taxes on the valuations for this year as fixed, not by themselves, but by the county courts of the respective counties. And that will be the decision now. If it becomes necessary to refer this to a master in order to ascertain what those valuations are, we will make that reference, and, perhaps, it would be better to have a master, if the case is going to remain so that the amounts due, on this basis, can be ascertained and required to be paid or collected. There will be no injunction, except for the excess over the amounts fixed by the county courts.

I am the more reconciled to this view, because, in my judgment, it effects an equitable result. It cannot be said that the state is not getting its full share of revenue, if these companies are required to pay, in the absence of any valid action on the part of the state board of equalization, on the value as fixed by the several counties in which this property is situated. That makes it

 Paul v. Pacific Railroad Company.

about the same amount the companies paid the year before, and a showing supplemental has been made, that the taxes for the year afterward were assessed and paid on just about the same valuation. There is no reason to suppose that these roads were worth twice as much in 1873 as they were the following year; and, from the evidence, the extent of this assessment is shown by a comparison of the percentage of taxation imposed by this action with that imposed on other railroads elsewhere, which may be presumed to be not far from the same value. Of course this is only a comparison of the taxes with the net earnings. The assessment on the Chicago and Northwestern Railroad is 8 65-100 per cent; on the Chicago, Rock Island, and Pacific, 4 91-100, or about five per cent; on the Chicago, Burlington, and Quincy, 5 76-100, or about six per cent; on the Lake Shore and Michigan Southern, 10 80-100 per cent; on the Illinois Central, 4 60-100 per cent; and on the Missouri, Kansas, and Texas for 1873, the year here in question, it was 38 73-100 per cent.

The judgment of the court is that the injunctions may remain to restrain the collection of taxes in excess of the amount fixed in the aggregate, by the various county courts, through which the roads run.

ORDERED ACCORDINGLY.

NOTE.—Upon the announcement of the foregoing opinion, Mr. Bowman, counsel for the state and counties, said that they acquiesced in the decision of the court, and, upon his motion, the cases were referred to a master to carry into effect the order of the court; and the court ordered those roads in the hands of its receivers at once to pay the taxes due from them on the above basis.

We append a report of the rulings of TREAT, J., in *Ketchum et al. v. The Pacific Railroad*, in the circuit court for the eastern district of Missouri, September, 1876.

KETCHUM *et al.* v. THE PACIFIC RAILROAD *et al.*

1. *Tax Bills.—Presumption.*—In a suit to collect taxes, tax bills, purporting to be certified by duly authorized officers, are presumed to be correct, and the burden of proof as to their legality lies upon those contesting them.
2. *Constitutional Law.—Board of Equalization.*—Under the new constitution of Missouri, the board of equalization created by section 18, article 10, became at once the only board for those purposes, and was clothed with all the powers of the previous board.

Ketchum v. Pacific Railroad Company.

3. *Power of Board of Equalization.*—The board of equalization, under the new constitution, has power to act as an original assessing body.
4. *Case in Judgment.—Law Governing.*—Section 11 of article 10 of the new constitution of Missouri, which took effect November 30, 1875, limits the rate of taxation for local purposes to an amount less than that allowed under the previous law. The levies in controversy were not ascertained until the summer of 1876, although the date at which the assessments were made relates back to the first of August, 1875: *Held*, that the rates prescribed by the new constitution must control.
5. *Power of Court over Wrong Assessment.*—Section 12 of the act of March 24th, 1873, provides that for the purpose of levying school taxes in counties on railroad property, the county courts shall ascertain from the returns in the office of the clerk of the county court, the average rate levied for school purposes by the school boards, and shall charge to the railroad companies taxes at said rates on the proportionate value of their property, certified to the clerk by the state auditor. Section 65 of the act of March 26th, 1874, requires the district boards to ascertain and report to the county court the amount they will require for school purposes for the ensuing year, and thereupon the county clerk shall assess the amount so returned on all taxable property in said districts, as shown by the last annual assessment. The defendants offered to prove, by the records of the county courts, that the rate for school purposes had been ascertained by taking the amount required by each school board and dividing it by the total property in the district, exclusive of railroad property, as shown by the last assessment, and that in extending this rate upon the taxable property, the valuation of the railroad property within the district was included: *Held*, inadmissible. A court cannot assume the functions of an assessor, and reduce the assessable value, nor include omitted property which is taxable. It must rely upon the assessment. If it exceeds the legal or constitutional limit, the court must cut it down. The functions of the court are not to value or assess, but simply to decide whether the rate is in excess, and at that point its functions cease.
6. —. *Mistake of Fact.*—In a suit for the recovery of taxes, the court cannot go behind the assessment and valuation made by the board of equalization, as to the number of miles of a railroad in a specified county. It cannot equalize and adjust the amount of taxable property in a county, nor correct mistakes of fact made by the board of equalization.
7. *Penalties under Act of March 15th, 1875.*—Receivers appointed by the court being in possession of the defendant road, during vacation, the tax bills in question were presented to them for payment. Doubts existing as to the legality of some of the levies, an arrangement was entered into between the attorneys of the receivers and petitioners, that the advice of the court should be taken upon the question: *Held*, that the defendant company did not come within the terms of the act of March 15th, 1875, which provides a penalty of two and one-half per centum where any railroad shall fail to pay taxes levied upon it, but that the court would award interest at the rate of ten per cent per annum from the day the taxes became due, in lieu of the penalty.
8. *Attorneys' Fees under Act of March 29th, 1875.*—Section 4 of the act of March 29th, 1875, allows a sum equivalent to five per cent of the sum recovered to be sued for as attorneys' fees "whenever any railroad company shall fail or shall have heretofore failed, within the time prescribed by law, to pay any taxes assessed and levied against it," etc.: *Held*, that the petitions in this suit were not suits for the recovery of taxes, within the meaning of said act: *Held*, further, that the amicable arrangement entered into between the parties to settle the amount of taxes due, by asking the advice of the court, did not come within the act.

(Before TREAT, J.)

The defendant railroads being in the hands of receivers appointed by this court, a number of counties filed their intervening petitions, asking for the payment of taxes assessed against the companies while in pos-

Ketchum v. Pacific Railroad Company.

session of the receivers, and that the same should be paid out of the fund in their hands. The cases were referred to a master, S. D. Thompson, Esq., who made the following report:

"Intervening petitions of Johnson, Gasconade, and Osage counties.

"1. As to the burden of proof. The counsel for the respondents insists that the burden lies, in the first instance, upon the petitioners to show at every step the legality of the taxes which they here ask the court to order the receivers to pay. I do not think this position well taken. I think that here, as in every other case, the burden of proof is, in the first instance, upon the plaintiff; but, that when the plaintiff presents, certified by the proper officer, tax bills purporting to have been made by duly authorized officers, and in conformity with law, this makes a *prima facie* case of right, and thereafter the burden shifts and remains with the respondents throughout the case. It seems to me that the case resembles the case of an action on a foreign judgment. Where a duly certified transcript of the record of the judgment is presented, this makes out the plaintiff's case, unless it appears upon the face of the record that the proceedings were void. The position contended for would place the petitioners in the attitude of wrongdoers, who come into this court, hat in hand, apologizing for their acts in advance; whereas, it seems to me, they stand here as representatives of a sovereign state, demanding its revenue; and it remains for an objector to put the sovereign in the wrong. I therefore respectfully recommend, on this point, that your honors direct that the tax bills presented in support of the intervening petitions, if duly certified in conformity with law, shall be deemed conclusive, except so far as the respondents show them to be illegal, and that they shall be then rejected only as to the illegal excess.

"2. As to the legality of the existing state board of equalization. The respondents contend that the state board of equalization which adjusted and equalized the valuation of railroad property in this state for the year 1875, viz., the board created by the new constitution (art. 10, sec. 18), consisting of the governor, state auditor, state treasurer, secretary of state, and attorney-general, was not the lawfully constituted board of equalization, but that the lawfully constituted board was the board created by the act of March 24th, 1873, composed of the lieutenant-governor and senate. The article of the new constitution in question simply says: 'There shall be a state board of equalization, consisting of the governor, state auditor, state treasurer, secretary of state, and attorney-general. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the state, and it shall perform such other duties as are, or may be, prescribed by law.' The respondents base their objection upon section 6 of the schedule, which recites that 'all persons now filling any office or appointment in this state, shall continue in the exercise of the

Ketchum v. Pacific Railroad Company.

duties thereof, according to their respective commissions and appointments, unless otherwise provided by law.' The respondents contend that under the operation of this provision, the old board continues in existence until 'otherwise provided by law.' But I think that in the provision previously quoted, in the constitution itself, it is 'otherwise provided by law.' The first sentence of that section devolves the duties of the state board of equalization on certain offices already existing. The second sentence prescribes the duties of the board; no legislation is needed to give effect to this provision; it is full and complete in itself, and I am of opinion that it is self-enforcing. But if this were not so, I take it that the rule which gives effect to the acts of *de facto* officers, applies in this case, and that where a board of public officers undertake to discharge certain functions under color of right, with the entire acquiescence of the people of the state, and, up to this time, with the acquiescence of these objectors themselves, the court will not investigate collaterally in a proceeding of this kind, the right of such officers so to act. The constitution and laws of Missouri afford a direct proceeding to oust persons who usurp the functions of public officers. (Constitution of Missouri, art. 6, sec. 3, 2 Wag. Stats. pp. 1133, 1134.) I am strengthened in this view by a provision in the general statutes of Missouri (2 Wag. Stats. p. 1213, sec. 241), which relates to the validity of sales of property for taxes. This statute declares that 'the acts of officers *de facto* shall be as valid as if they were *de jure*.' Apart from the fact that the overturning of the work done by this board, and opening up of the entire re-assessment of railroad taxes in the state of Missouri, for the year 1875, the most of which have probably by this time been paid, would work the greatest injury to the public interest, it does not lie in the mouth of these respondents to stand by and permit a board, alleged to be an usurping body, to perform the functions of the board claimed to be the legal board, without instituting the proper proceedings to oust it, and then to object here for the first time to the validity of its acts. I therefore respectfully recommend that this objection be overruled.

"3. Whether the board of equalization which fixed the valuations in question in those cases, was a board of assessors, or merely a board of equalizers. A similar question came up and was decided by your honors in the case of *Paul v. The Pacific Railroad et al.*, at the last term of this court, with reference to the power of the board of equalization established under the laws of 1873. That decision was rendered in view of the fact that a subsequent legislature (sec. 7, act of March 15th, 1875), had extended the terms of the previous statute by expressly clothing the board with the power of a body of assessors. If the question rested solely upon a comparison between the language of section 12 of the act of 1873, with section 18, article 10, of the new constitution, your honors' ruling in that case would probably govern here. That

Ketchum v. Pacific Railroad Company.

statute empowers the board 'to adjust and equalize the aggregate valuation of the property of each of the railroad companies liable to taxation,' etc. By the above named section of the constitution, the duty of the board is 'to adjust and equalize the valuation among the several counties in the state.' But in the same sentence it is added, 'and it shall perform such other duties as are or may be prescribed by law.' The duties prescribed by the act of March 15th, 1875, section 7, to the state board of equalization, which existed at the time the constitution was framed, are those of a body of assessors as well as equalizers; and it is reasonable to suppose that the framers of the constitution had this fact in view when they adopted the language named. Besides, it cannot be supposed that the convention intended to devolve upon the five principal officers of the state government a mere work of mathematical calculation involving no discretion whatever—the equalizing of assessments made by the county courts—a work which could better be performed by a clerk in the auditor's office. If there is room for latitude of construction or fair doubt as to the meaning of the constitutional ordinance or statute, that construction will not be adopted which results in nonsense.

"I therefore respectfully recommend that this objection be overruled, and that, for the purpose of ascertaining the amount of taxes due in these proceedings, the assessments made by the state board of equalization be deemed valid assessments.

"4. Whether the rates of taxation here in question are governed by the new constitution, or whether they are valid if in excess of the limits prescribed by the new constitution, but not in excess of the limits prescribed by previously existing laws. This question I regard as one of substantial difficulty. It has created considerable diversity of opinion among public officers in the state. Some of the counties appear to be conforming their rates to the limits of the new constitution, while others are levying rates which are in excess of the constitutional limits. The provisions of the constitution referred to will be found in section 11, article 10. The supreme court of Missouri has recently held that the provisions of this section limiting the rates of taxation for various purposes, are self-enforcing. (*Ex parte St. Joseph Board of Public Schools*, 3 Cent. Law Jour. 575.) But the question in that case arose upon a levy made in 1876, and for the year 1876, and that decision is hence not decisive of this question. It is admitted that the levies in controversy under these intervening petitions were not in fact ascertained until the summer of 1876, although the date at which the assessments were made related back to the first day of August, 1875. The new constitution went into effect between these two dates, viz., on the 30th day of November, 1875. Now, unless these levies relate back to the date to which the assessment relates, August 1st, 1875, a date prior to the constitution, or unless they are to be understood as having been

Ketchum v. Pacific Railroad Company.

in fact made prior to the constitution, the constitutional rates will govern. It is contended that the doctrine of relation applies, and that as this doctrine is invoked for the purpose of reaching justice, the court will invoke it here in order to reach equality of taxation; that as the date of valuation or assessment is the first of August, 1875, the levy should be held to relate back to the assessment, and the constitutional limits do not therefore apply. In support of this principle, it is conceded that the assessment and levying of taxes against railroad property for a given year is, so to speak, a year behind general property; that for the purpose of raising the revenue of 1875, the assessment of general property is made in 1874, and the county courts ascertain and fix the rates to be levied in the spring of 1875; whereas the assessment of railroad property for 1875, though made upon the basis of the property owned and used by the railroad company on the first day of August of that year, is not in fact completed by the state board of equalization until the spring of 1876; so that the taxes for 1875 were in fact levied and paid upon general property according to rates fixed by the county court prior to the adoption of the new constitution, viz., in the spring of 1875. Again, it is urged that the rates levied upon railroad property were, in contemplation of law, levied by the county courts at the time when they fixed the rates for general property, viz., in the spring of 1875. In support of this provision, section 12 of the act of March 15th, 1875, is relied on. This section contains the following clause: 'The county court, upon receipt from the auditor of the certificate of the action of said board, shall immediately ascertain and levy the taxes for state, county, municipal township, city, incorporated town, and school purposes, on the railroad and the property thereof in such county, municipal township, city, and incorporated town, at the same rates as may be levied on other property.' It is contended for the petitioners that the words 'may be levied,' are equivalent to 'have been levied,' and that the county court, in performing the act here prescribed, does not perform a new act of discretion, but simply declares that the rate which it had previously fixed for general property for the year in question, shall be by the clerk extended against railroad property. This argument loses some of its force in view of the inability of the petitioners to point out to me any statute fixing a definite time when the county court shall ascertain and fix the levies for general property. Section 166 of the revenue law (2 Wag. Stats. p. 1193), provides that this shall be done 'as soon as may be after the assessor's book of each county shall be corrected and adjusted according to law.' The petitioners, therefore, fail to show that the levies for general property were not themselves made subsequent to the adoption of the new constitution.

"The attorney-general of this state has been called upon to give opinions on this subject, and his opinions are in accordance with the

Ketchum v. Pacific Railroad Company.

grounds taken by these respondents. I subjoin printed copies of three of them for the information of the court.

"I cannot see that the argument of the petitioners, founded on the doctrine of relation, has any force. The assessment and the levies are distinct acts of different tribunals, and do not have any necessary reference to each other. The law is inflexible in the requirement that the property shall be assessed at its cash value upon a particular date, and the act of ascertaining and fixing the percentage of taxation to be levied is a judicial function performed by the county court, based upon the amount of taxable property, as shown by assessments previously made.

"While, therefore, it would seem desirable, if the court can see its way clear to do so, to adopt the view taken by the petitioners in order to produce equality of taxation, and thereby to give effect to the favorite maxim that 'equity is equality,' yet I am unable to see any clear ground upon which this can be done. I submit this question to your honors, with the recommendation that the master be instructed, in computing the amounts due, to reject such portion of the rates as are in excess of the limits prescribed by the new constitution.

"5. Whether this court, by its master, has jurisdiction to revise the method adopted by the county court clerk, in ascertaining the rate of taxation for school purposes, under section 12 of the act of March 24th, 1873, and section 65 of the act of March 26th, 1874. The former act provides as follows: 'For the purpose of levying school taxes in the several counties on railroad property, the several county courts shall ascertain, from the returns in the office of the clerk of the county court, the average rate of taxation levied for school purposes by the several local school boards or authorities, and shall cause to be charged to the said railroad companies school taxes at said average rate, on the proportionate value of said railroad property so certified to said clerk of the county court by the state auditor, under the provisions of this act.' The latter act requires the district boards to ascertain and report to the county court estimates of the amount of money they will require for school purposes for the ensuing year, and then provides (section 65) as follows: 'On the receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in said districts, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district, of the amount of goods, wares, and merchandise owned by them, and taxable for state and county purposes.' The objection raised by the respondents, the receivers, to the method adopted by the county clerk of Johnson county, and by the clerks of other counties, whose petitions are before me, and have not yet been heard, is this: The respondents allege, and offer to prove by the records of the county courts in question, that the rate for school taxes has been

Ketchum v. Pacific Railroad Company.

ascertained by taking the amount of money required in each district by the school board thereof, and dividing this amount by the total property in that district, exclusive of railroad property, as shown by the last annual assessment for state and county purposes, and that in extending this rate upon the taxable property, the valuation of railroad property within such district is included, so that the rate is extended upon property which was not taken into consideration in ascertaining the rate which would be necessary to raise the required amount, thus producing an amount greatly in excess of the amount required by the school boards.

"This method of ascertaining the rate to be levied for such purposes is, in my judgment, clearly in violation of section 65 of the act of March 26, 1874, above quoted, which requires the county clerk to assess the amount required 'on all taxable property, real and personal, in said district, as shown by the last annual assessment,' etc. The result of this method of fixing the rate is not to produce inequality of taxation, but to produce a revenue in excess of the amount required. The method objected to is as oppressive to the farmers and merchants as to the railroad companies, since if all the property, including railroad property, were taken into consideration in ascertaining the rate, the rate extended upon all property would be correspondingly lower. The doubt which has arisen in my mind upon this point is: Has the court jurisdiction to revise and correct such erroneous levies? Can this court, by its master in chancery, assume to this extent the functions devolved by law upon the county court clerks? If the rate fixed does not exceed the constitutional limit, can this court say that the errors committed in ascertaining such rate render the levy void, so that this court can do over again the work of the county clerk, and reject the void excess? On the other hand, it is urged that, in a proceeding in equity, it would be unconscionable for the court to order the payment out of a fund in its hands of a tax which is clearly in excess of any amount lawfully ascertained. I incline to the latter view, and my recommendation on this point, made with much diffidence, is, that the master be instructed to ascertain a rate based upon the entire taxable property in the various school districts, and to extend such rate upon such property.

"6. Whether, if it appears as a matter of fact that the state board of equalization have made a mistake in determining the number of miles of the Pacific Railroad in any county, it is competent for the court, through its master, to hear evidence upon such question, and correct such mistakes, thereby increasing or diminishing the taxable valuation of the property of the railroad company, fixed by the board for such county. Proof has been offered which clearly shows that the board of equalization has committed mistakes in this particular as to two, and probably three, of the counties. Such mistakes probably originated in clerical errors in the statement made by the railroad company to the

Ketchum v. Pacific Railroad Company.

state auditor, upon which the board of equalization based their estimates of valuation. It is in proof that Osage county has received credit for five miles of road more than there are in that county, and that the number of miles of road credited to Gasconade county is two and a half miles less than the number of miles actually in that county, and that there is a deficiency of two and a half miles in the assessment made by the board for some other county or counties, but what county or counties has not been ascertained. There is no controversy that these errors of fact have been committed by the board of equalization; nor will it probably make any difference in the aggregate value of taxes to be paid by the receivers whether the mistakes are corrected or not. But the question remains: Has the court jurisdiction to correct them, so as to produce equality among the counties as to which the mistakes have occurred? As no party injuriously affected by these mistakes has complained, I would respectfully recommend that they be allowed to stand.

"7. As to penalties. Section 16 of the act of March 15, 1875, provides as follows: 'In case any railroad company shall fail to pay into the county treasury of any county wherein, by the provisions of this act, any taxes levied for state, county, municipal township, city, incorporated town, or school purposes, on the property of said railroad, are made payable on or before the first day of July next after the same shall have been levied, said company shall forfeit and pay into the county treasury, in addition to the taxes with which said company may stand charged on the books of said county, a penalty of two and one-half per cent per month on the amount of taxes against said company, which penalty shall be apportioned to the various funds respectively.' I do not think this penalty ought to be enforced in this case. *First.* The taxpayer here is not a 'railroad company,' but the receivers of this court. *Secondly.* I am of opinion that the receivers are not in default. These tax bills were presented to them during the vacation of this court; grave doubts existed as to the legality of some of the levies, particularly those in excess of the rates prescribed by the new constitution; and by a friendly arrangement between the attorney for the receivers and the attorneys for these intervenors, it was determined to wait until the commencement of the term, and take the advice of the court upon the question, and these petitions are filed for that purpose.

"I respectfully suggest that it would be reasonable to allow ten per cent per annum, in the way of penalties, as was done by this court at the last term, in the case of *Paul v. The Pacific Railroad et al.*, and other cases then determined, involving the validity of the railroad taxes for 1873.

"8. As to attorney's fees. In addition to the taxes claimed, the petitioners claim a sum equivalent to five per cent of the sum recovered, as attorney's fees, under section 4 of the act of March 29, 1875. This

Ketchum v. Pacific Railroad Company.

act provides specifically the manner in which suit may be brought and prosecuted 'whenever any railroad company shall fail, or shall have heretofore failed, within the time prescribed by law, to pay any taxes assessed and levied against it,' etc. I think this demand ought not to be allowed. No 'railroad company' here has failed to pay taxes, but the parties who have failed are the officers of this court, and their excuse for so failing is above stated, and I am of opinion that this is not a suit for the recovery of taxes, such as is contemplated by the act named. I therefore respectfully recommend that this claim be not allowed."

Exceptions being filed to the master's report, the following judgment was delivered by TREAT, J.:

TREAT, J.—1. The tax bills are to be presumed correct, unless on their face it appears that there was an illegal assessment. The court must decide on the face of the bills whether any demand exists thereunder. If facts dehors the face of the bills are necessary to show their illegality, the person controverting their legality must show those facts.

In this case it is the duty of the receivers, under the instruction of the court, to pay the taxes due. They are to pay such taxes and no other—i. e., to pay no more than what the law exacts; and they must inquire, as private citizens or corporations have a right to do, into what the law requires, and by the same legal methods. When the tax is assessed, and no appeal taken, the tax-payer is bound as to valuation, yet may resist any excess of rates. Under the rulings of this court he must pay or tender the amount admitted to be due, and contest for the balance.

The ruling of the master as to the first point submitted, concerning burden of proof, is correct. And the exception thereto is overruled.

2. As to the second proposition submitted, it is ruled that the board of equalization, under the new constitution, became at once the only board thereafter for that purpose, and was clothed with all the powers and duties of the board for which it was substituted, and that its acts are valid and obligatory. The exceptions on this point are overruled.

3. The foregoing views as to the second point, cover the third point. The exceptions to the third point in the master's report are therefore overruled.

4. As to the fourth point, it is ruled that the rates prescribed by the new constitution must control. That organic law at the date of its operation became the paramount law on this subject, and even if it worked inequality as to pending matters of taxation, no court can go behind its requirements and import into it exceptions on the ground that inequality would otherwise result. All organic changes may, and must, work results different from what previously existed; but that fact does not deprive the sovereign will of its power, or enable a court to say that what is thus made the supreme law shall not be so, because it may

Ketchum v. Pacific Railroad Company.

be that, in the final outcome of the transition from the old to the new order of things, one or more inequalities may be wrought. Such organic changes must necessarily be general, and operate on all matters for which they provide. Were this not so, it would have to be held that all pending matters, of whatsoever nature, must continue to be regulated and controlled by an abrogated system, or that two constitutional systems were in force at the same time concerning the same subject matter. Matters of taxation are subject to the sovereign power of the state, and when the sovereign will is expressed, it controls not only state officers, but also all the municipal sub-divisions of the state.

The master is instructed, therefore, to reject all excess of rates over those prescribed by the new constitution; and the exceptions to this part of his report are overruled.

5. As to the fifth point: It is suggested that the amount of school tax is excessive for the reasons stated, and therefore the master should reduce the same to the amount which is justly taxable. He must rely upon the assessment. If it exceeds the legal or constitutional limit, he must cut it down. If it does not, he cannot assume the functions of the assessor and reduce the assessable value, nor include omitted property which was taxable. His functions are not to value or assess, but simply to decide whether the rate is in excess, and at that point his functions cease. Whether more or less property has been included in the assessment is not for the master to decide. If, on an estimate of all the taxable property, including the railroad property, a larger or smaller sum would be required, is not for him to determine. It may be that, through the means adopted, an excess of taxes will be received for a specified year; but, if so, the amount required may be diminished the subsequent year, and thus equalization effected. But this court cannot, nor can the master, undertake, through valuations of property included or omitted, to determine that a smaller or greater rate of school tax would be required. The action of the competent authorities must be considered decisive of that question.

As to this point, the court overrules the views of the master, and sustains the exception thereto. In passing upon that class of taxes, he will conform to the views herein expressed.

6. The same doctrine must prevail on this point as last stated, viz.: That the assessment and valuation, as to the number of miles in a specified county, must control. The master cannot perform the functions of an assessor, or a board of appeals, for equalizing and adjusting the amount of taxable property in a county. True, if there were no property of the tax-payer in the county, he could refuse to pay a tax bill made out against him; but if he has the property specified, and the assessors, through mistake as to its measurement, tax him more than would have occurred if the correct amount had been ascertained, the master cannot go behind the valuation. Were this otherwise, this court would become a board of

Moore v. Holliday.

appeals to correct errors in assessments, and the revenues of the state and its municipal sub-divisions would, or might be, destroyed, so far as the immediate and pressing needs of the government require prompt action.

This court cannot correct mistakes of fact, if any are made by the board of equalization, and substitute its own judgment, by hearing evidence, for that of the proper tribunal established for that purpose. The exceptions to the sixth point are overruled.

7. The views of the master as to penalties are in precise accord, under the facts stated, with the previous rulings of this court. The exceptions under this head are overruled.

8. As to this point, in addition to the views of the master, it may be stated that the court, in order to expedite the collection of taxes, ordered the receivers to pay whatever taxes were due. The receivers were officers of the court, and the funds in their hands were subject to its order. To avoid delay, costs, and expenses, the counties, instead of bringing suits against the delinquent roads, were permitted to apply summarily to this court. It seems that the delays and excessive demands, illegal in their scope in some particulars, caused the investigation which has ensued. There was an honest doubt as to the law, and its effects upon the demand made. Instead of driving the parties to a protracted litigation for the settlement of their disputes, this court has, as a court of equity, permitted all concerned to appear and contest, subject to equitable rules. The intervenors, as is now held, made excessive demands, which the receivers ought not to have paid. Hence no penalties can be enforced. Exceptions to the eighth point overruled.

ORDERED ACCORDINGLY.

LEWIS H. MOORE *et al.* v. THOMAS HOLLIDAY, State
Auditor, *et al.*

1. The judgments of the supreme court of Missouri construing the charter of the Hannibal and St. Joseph Railroad Company as to the taxation of the company's property, adopted and followed.
2. An injunction to restrain suits in the state courts for the collection of taxes, denied.
3. Under special circumstances, a temporary injunction to restrain the collection of retrospective taxes on the company's property, for all the years between 1860 and 1871, was allowed.

(Before DILLON, Circuit Judge.)

Moore v. Holliday.

*Taxation of Property of Railroads.—Construction of Charter.
—Injunction.*

THIS is a bill for injunction and relief. On motion, on the bill, for a temporary injunction. The necessary facts appear in the opinion of the court.

Mr. Carr, for the plaintiff.

Mr. Henderson, and others, for the defendants.

DILLON, *Circuit Judge*.—This is a bill by stockholders of the Hannibal and St. Joseph Railroad Company against the state auditor and various counties and municipalities along the main line of the road, and along the Cameron and Kansas City branch, to restrain the collection of various taxes—state, county, school, and municipal—amounting to several hundred thousand dollars. Upon an examination of the bill, and consideration of the arguments of counsel, the following are the conclusions to which I am brought:

1. So far as the bill rests upon the proposition that section 3 of the act of September 20th, 1852, makes the mode of ascertaining the value of the road and property of the company (viz.: by the sworn statement of the president of the company), a legislative contract which cannot be altered by subsequent legislative provision, my opinion is that the proposition is unsound. The supreme court of Missouri has expressly so decided in *The State of Missouri v. Hannibal and St. Joe Railroad Co.*, and in the case of *Livingston County v. The Hannibal and St. Joe Railroad Co.*, at the May term, 1875. That court there approves and follows the decision of the supreme court of the United States in the case of *Bailey v. Maguire*, 22 Wall. 215.

I am inclined to think that it is impossible to make any solid distinction between the Bailey case and the present case, as respects the point under consideration.

By the supreme court of Missouri it is held that, under the above mentioned section 3 of the act of September 20th, 1852, the property of this railroad company is exempt from taxation

Moore v. Holliday.

for *county* purposes, but not from taxation for municipal, school, or other local purposes (*Livingston County v. Hannibal and St. Joe Railroad Co.*, May term, 1875, and prior cases there cited). This view I adopt and follow. But as respects Clay and Clinton counties, situated on the so-called branch, my opinion is that they are not within the operation of the said section 3 of the act of 1852, and other statutes applicable to the subject.

2. So far as the bill in this case asks to enjoin suits already brought and now pending in the state courts, to enforce the collection of any of the taxes complained of, it is sufficient to remark that an express statute of the United States has prohibited such interference, since the act of March 2, 1793, re-enacted in section 720 of the revised statutes.

3. So far as the bill seeks to enjoin the taxes for 1874, by reason of the alleged illegal action of the board of equalization under the act of March 15, 1875 (Laws 1875, p. 113), my opinion is that the bill presents no sufficient grounds for the allowance of the writ of injunction. By that act the state board was made an assessing as well as an equalizing body.

4. But as to the taxes for 1873, the bill makes just such a case as was made in several cases in this court in respect of the taxes for that year against the Iron Mountain and other companies, and where this court (MILLER, DILLON, and TREAT, Judges, concurring) made an order for the allowance of an injunction on the companies paying to the proper officers by a short day the amount of taxes which would be due on the basis of the valuations fixed by the county courts. If such payment was made, we would enjoin the excess pending the determination of the question. If not made, the injunction would be denied. (3 Dillon, 25; *Paul v. Pacific Railroad*, *ante.*) A similar order will be made in the case as respects the taxes for 1873.

The injunction may also go against the collection of any county taxes by the defendants, or any of them, except on the branch road. In view of the allegations of the bill as to retrospective taxation for all the years from 1860 to 1871, inclusive, and the mode by which, and the basis on which, as alleged, the valuation

Tscheider v. Biddle.

was determined, I think the case made is such as to justify the allowance of a temporary injunction as to the collection of such taxes, not to interfere, however, with suits already brought to enforce them. Counsel must understand that we never have interfered, and do not intend to interfere, with suits actually depending in the state tribunals.

ORDERED ACCORDINGLY.

PETER TSCHIEDER *et al.* v. CATHERINE BIDDLE.

1. A lease of certain real property in St. Louis was made for ten years, with a covenant by the lessor for periodical renewals, extending through terms aggregating a period of five hundred years; the amount of rental at the end of each ten years was to be ascertained by assessors to be appointed by the parties; the lessor fraudulently sought to evade the provisions of the lease in respect to renewals; the lessee, on the faith of the covenant for renewal, had expended in buildings on the demised premises, \$113,000; the lessor sued the lessee at law for use and occupation, whereupon the lessee filed this bill in equity, to stay the action at law until the lessor appointed an assessor, as required by the lease: *Held*, that a general demurrer to the bill should be disallowed; and the lessee being willing to comply with the lease as to renewal, the court entered an order staying the proceedings at law until the lessor should appoint an impartial assessor to make the valuation, reserving the right to discharge or modify the order as justice might require.
2. As to the specific execution of agreements to refer or to arbitrate, see note.

(Before DILLON and TREAT, JJ.)

Covenant to Renew in Lease.—Specific Execution of such a Covenant where the Rental is to be fixed by Third Persons.

IN EQUITY. Catherine Biddle brought an action at law in this court against Peter Tscheider *et al.* for use and occupation. In her petition she simply alleges that she is owner of a certain lot of ground (describing it); that Peter Tscheider *et al.* had occupied said lot of ground during one year with her permission;

Tscheider v. Biddle.

that the value of the occupation of such premises was worth the sum of — dollars; that Peter Tscheider *et al.*, the occupants, are bound in law to pay her that amount for such occupation, and therefore she prays judgment.

In defence, Peter Tscheider *et al.* set up as a bar to the action a clause in an original lease for ten years, dated the 28th day of May, 1864, between Catherine Biddle and Peter Tscheider *et al.*, that within the last quarter of said term of ten years, the said Catherine Biddle, lessor, and the said Peter Tscheider *et al.*, lessees, should appoint two assessors — one each — who should proceed to ascertain the value of the said lot of ground, as a naked lot, without reference to the improvement, and after having ascertained the true and fair market valuation of said lot, they should fix and agree upon the rent which should be paid by the lessees for another term of ten years, which rents, however, should not be less than six per centum upon the value of the property so ascertained; that after the said assessors had so agreed upon the amount of the rental of said property, then Catherine Biddle should execute to the said lessees another lease of the lot for ten years, at the rental so fixed by the assessors. If the assessors so appointed by the parties should not agree as to the valuation of the lot, or to the rent to be paid upon that valuation, then they should select a third assessor to assist them. Then, when and if these three assessors should *unanimously* agree upon the valuation of said lot, and the rental to be paid for said lot, Catherine Biddle should execute a new lease for the said lot to said lessees, for ten years, at the rental so fixed, and so on, for each succeeding term of ten years, for the period of five hundred years.

The answer then proceeds to aver that the parties have made five different attempts to have the rental of said lot fixed and determined by assessors, as provided in said original lease; that these five efforts have failed; that the failure is attributable entirely to the bad faith of Catherine Biddle, who, it is charged, appointed incompetent and prejudiced men as her assessors, and instructed and limited them as to value, with a view of forcing

Tscheider v. Biddle.

upon respondents, the lessees, an extravagant valuation of said premises; that by reason of her instructions and limitations, no agreement could be had among the assessors; that the only rent which Catherine Biddle is entitled to receive for said property is the rent which shall be fixed in the manner provided in said lease, and as no rent has been fixed in the manner provided in said lease, Catherine Biddle could recover no rent whatever for the use and occupation of her said property, and that the suit for the use and occupation should be dismissed, and its progress stopped.

To this answer Catherine Biddle demurred, on the ground that it was not a sufficient or legal defence to the action.

After argument the demurrer was sustained, and all that portion of the answer setting out the agreement to appoint assessors and to grant a new lease upon the basis of their finding, was stricken out.

The case was set down regularly for hearing on the 30th day of September, 1876. On that day Peter Tscheider *et al.* filed the present bill in equity in this court, in which they set out substantially the agreement and facts set out in the answer, as a bar to the action of use and occupation, and which the court held to be bad on demurrer; that no rental had been fixed in the manner provided in said agreement; that no new lease or renewal had been executed, in accordance with the terms of said agreement; that the lease was obtained for the purpose of enlarging a church edifice thereon, and erecting thereon a dwelling-house for the religious body using the church edifice; that, relying upon the covenants of the lease, the lessees have enlarged said church edifice, and erected a building on the demised premises, at a cost of \$113,240.27; that the complainants are ready to comply with the lease in all its parts, and have five times appointed assessors, who were disinterested, to meet assessors appointed by the lessors, but the attempts to procure a valuation failed, because the lessors appointed men as assessors whose opinions as to valuation were previously known, and whom they had instructed or restricted not to go below a certain valuation, which was excessive, and

Tscheider v. Biddle.

fifty per cent more than the value of the property; that the lessors' assessors made excessive valuations accordingly, whereas the lessees' assessors made fair valuation; that the lessors have purposely and fraudulently prevented any valuation of the rental, as provided by the lease, with a view to extort an unconscionable rental from the lessees, who aver their willingness to appoint an assessor to meet one appointed by the lessors, who refuse to make such an appointment; that defendant, Catherine Biddle, is now seeking to recover, in an action at law in this court, for use and occupation of said premises, against your orators, Peter Tscheider and Joseph Weber, an exorbitant and excessive rent. They therefore pray that the further prosecution of said case of Catherine Biddle against Peter Tscheider and Joseph Weber be enjoined.

The prayer of the bill of Peter Tscheider *et al.*, as amended, is as follows: They therefore pray that plaintiff and defendants be required to appoint assessors, as required and contemplated by said lease, and in accordance with the terms and provisions thereof, and proceed to an ascertainment of the rental value of the premises, as in and by said lease contemplated and provided, and that defendants be ordered and directed to execute to said lessees a renewal term of said lease, as therein provided; and unless they do so, and in the meantime, the further prosecution of the said case of Catherine Biddle against Peter Tscheider and Joseph Weber be enjoined, and for such other and further relief as the equity of the case may require, and to your honors may seem meet.

The cause is now before the court on the demurrer of Catherine Biddle to the bill of complainants.

E. T. Farish, for complainants (Tscheider *et al.*)

Grover & Ellis, for defendant (Biddle).

DILLON, *Circuit Judge*.—On the demurrer the averments of the bill in equity are admitted on the record. The lessees obtained a lease for ten years, with the right to periodical renew-

Tscheider v. Biddle.

als for five hundred years, the rental to be ascertained by assessors in the manner provided in the lease. The lessees have entered into possession, and on the faith of the efficiency of the covenant to renew, have made improvements on the demised premises costing over \$100,000. At the end of ten years, the lessors, instead of complying in good faith with the covenant as to renewal, act, as it is alleged, in bad faith and fraudulently, to prevent a valuation and a renewal. Hence no renewal has been had. The lessees are still in possession. The lessors bring an action at law in this court, for the use and occupation of the premises — of the whole premises, and not simply of the premises aside from the improvements made by the lessees. On a demurrer to the answer at law, we held that the unexecuted provisions of the lease as to renewal, although attributable to the fault of the lessors, was no answer to the action; and this holding was in accordance with the decisions of the supreme court of Missouri, in a case which arose under a similar lease. (*Finney v. Cist*, 34 Mo. 302, and its sequel, *Garnhart v. Finney*, 40 Mo. 449; and see, also, *Biddle v. Ramsey*, 52 Mo. 153.) And if, under such circumstances, the lessor can recover at law for use and occupation, he could recover the possession in ejectment, if he had seen fit to adopt that remedy. The lessees being without fault, and willing to comply with the lease, what are their rights and remedies?

They may, it is said, sue the lessor at law for a breach of the covenant in respect to renewals, and recover damages. This was so held in *Garnhart v. Finney*, *supra*, and has been adjudged in other cases (*Greason v. Keteltas*, 17 N. Y. 491; *Hopkins v. Gilman*, 22 Wis. 476).

It will be observed that it is so held, although the obligation to renew does not become consummate until the valuation is fixed, and such valuation is to be ascertained by arbitrators, who had never been appointed or acted. But assuming that on the facts stated in the present bill, the lessees might sue the lessors for damages, is this their only remedy? If so, it is obvious that the law is so defective as to shock the sense of justice, and that it rewards the party who fraudulently seeks to evade his obliga-

Tscheider v. Biddle.

tion at the expense of the party who has trusted the covenants of the lessor and expended large sums of money on the faith that he would observe those covenants. If this lease contained a simple covenant to renew at a fair valuation, such a covenant, it is admitted, could be specifically enforced, and the court would settle the valuation or rental to be paid. The lessee in such a case is not confined to an action at law for damages, but may go into equity for a specific execution of the covenant to renew. This is settled law. Is the right, the equity, to a renewal in these lessees any the less cogent and persuasive because they have provided the means for ascertaining the rental on the renewal, and the lessor purposely and fraudulently thwarts the execution of those means? As an original proposition, after much reflection, I should say that it was in accordance with sound principle to hold that if the lessor were guilty of the fraudulent conduct charged in the bill, he subjected his conscience to be laid hold of by the chancellor, who would say to him, "You have agreed to renew—the lessee has expended large sums of money on the faith of that agreement—you refuse to execute the provisions for the fixing of the valuation by arbitrators—you cannot, therefore, object if the court, with the concurrence of the lessee, proceeds to fix the valuation under the provisions of the lease." Some adjudications, however, have been made, with which it might not be easy to reconcile the view just stated. (*Milnes v. Gery*, 14 Vesey, 400; *Greason v. Keteltas*, 17 N. Y. 491; *Hopkins v. Gilman*, 22 Wis. 476.) These cases proceed upon the notion that such provisions as those in this lease are in effect an agreement to arbitrate, and that agreements to arbitrate will not be specifically enforced in equity. I agree to the reasonableness of the doctrine that a court of equity will not enforce a specific performance of an agreement to arbitrate. The grounds of this doctrine and the cases in its support are given by Mr. Justice STORY, in *Tobey v. County of Bristol* (3 Story, C. C. 800). To refuse judicially to enforce an agreement to arbitrate occasions no injustice, for the courts remain open to the parties, with better provisions for securing justice than are possessed by arbitrators.

Tscheider v. Biddle.

So, when the refusal of a court to appoint or compel the appointment of arbitrators, or substitute its judgment for the judgment of arbitrators, will occasion no injury which cannot be fully and adequately redressed by an action at law, as in the ordinary case of an agreement to sell, it is entirely consistent with sound principle for a court of equity to decline to interfere. In this view I can agree to the actual decision on the facts of the cause, of Sir WILLIAM GRANT, the master of the rolls, in the leading case in *Milnes v. Gery* (14 Vesey, 400), without assenting to the reasoning of that great judge that equity is absolutely disabled from interfering to compel a specific execution unless the price of the property has been ascertained in the prescribed mode. That was the case of an agreement to sell. The parties could be placed *in statu quo*. No *mala fides* was imputed, and the failure of arbitrators to agree was not owing to bad faith; under such circumstances the refusal of the court to appoint its own master to fix upon the price can be well justified. But such a case as that made by the present bill is entirely different; here the parties cannot be put *in statu quo*—here *mala fides* is imputed—here a remedy at law for damages does not satisfy the covenant or the demands of enlightened justice. It is a well settled principle that courts will not compel the specific execution of a mere agreement to arbitrate; but I am strongly convinced that it is erroneous to apply that principle to cases like the present, where it would result in manifest and gross injustice. The cases somewhat like the one before us (*Greason v. Keteltas*, 17 N. Y. 491; *Hopkins v. Gilman*, 22 Wis. 476), while asserting that the lessees have a remedy at law, but none in equity, for specific performance, deserve, I think, further consideration before assenting to their entire correctness.

In *Greason v. Keteltas*, the refusal of the lessor to appoint arbitrators or take steps for an appraisal was held to subject him to liability at law for the value of the building on a valuation fixed by the court, although the covenant was that this valuation was to be fixed by arbitrators. If such refusal on the part of the lessor is a breach of the covenant so as to render him liable

Tscheider v. Biddle.

for damages or to pay for the improvement on a judicial valuation, why is it not such a breach of duty as to justify a court of equity, when substantial justice requires it, to compel the lessor either to make the appointment or to make one for him, or otherwise judicially ascertain the valuation? Where is the equity of the party who purposely and fraudulently seeks to evade the contract on his part to insist that a valuation by arbitrators is a *sine qua non* to equitable relief? Is he not in such a case estopped to set up his own wrong and fraud in defence to the relief to which his adversary is otherwise clearly entitled?

I suggest these views that attention may be directed to this subject, and not because they are absolutely essential in this stage of the cause to support the present bill. I admit that in specific performance the court must enforce the contract made by the parties, and that it cannot ordinarily modify this contract or make another and enforce that; but this sound and necessary principle does not preclude the operation of the principle of estoppel where this principle is necessary in order to do justice. Where the covenant to renew on an appraisal by third persons has, as in this case, been acted on by the lessee, and where the failure to secure a renewal will work an injustice for which an action for damages is not a complete remedy, and where the lessor fraudulently thwarts the appraisal, why is he not estopped to set up the want of an appraisal caused by himself as a bar to appropriate equitable relief?

The leading English decisions, from *Mitchell v. Harris*, 2 Vesey, 129, to *Scott v. Avery*, 5 House of Lords Cases, 811, and *Dawson v. Lord Otto Fitzgerald*, 9 Law Rep. Exch. 7, S. C. 3 Cent. Law Jour. 477, have been critically examined, and, when thoroughly understood, I do not think that in their essential facts they are in conflict with the above views. And the right to some equitable relief in cases like the present is directly decided by the supreme court of Missouri under a lease exactly similar to the one before us, in *Biddle v. Ramsey*, 52 Mo. 159, and is also recognized by the supreme court of Wisconsin in the case of *Hopkins v. Gilman*, before cited.

Tscheider v. Biddle.

In this connection it may be useful to refer to a provision in the English Common Law Procedure Act of 1851, the eleventh section whereof provides that "whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any existing or future difference between them, or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, for any of them, or against any person or persons claiming through or under him or them, in respect to the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration, according to such agreement as aforesaid, and that the defendant was at the time of bringing such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit on such terms, as to costs and otherwise, as to such court or judge may seem fit; provided, always, that any such order may at any time afterwards be discharged or varied as justice may require." (17 and 18 Victoria, c. 125, sec. 11; Daniells' Chancery Practice, 4 Am. ed. vol. 2, p. 1861.)

It may be true, as suggested by the defendant's counsel, that the statute had its origin in the doctrine of the cases in the English courts before referred to, which, to a large extent, nullified agreements to refer matters in dispute to arbitrators; but if so, it shows that the cases which were relied upon by defendant's counsel were productive of such results that this enactment was deemed expedient. However it may be in England, I see no reason for the position that such a statute in this country is necessary in order to justify a court of equity in making by analogy

Tscheider v. Biddle.

such a rule or order as therein provided for when justice requires it and no good reason exists for not making it.

A rule or order will accordingly be entered in this case staying the prosecution of the law action for rent until the further order of the court. If the law action would settle the amount of rental on a renewal, there might be good reason for allowing it to proceed; but it will not have that effect. Such a rule or order does not contravene the principle contended for by the defendant that before there can be a decree for renewal the rental must be fixed by arbitrators and cannot be fixed by the court, since the object of the rule or order is to compel the defendant (lessor) to himself appoint the assessor, who is to represent him. If he appoints an impartial person, without instructions, and he is met with an impartial appointment by the lessee, it is probable that an agreement as to the rental will be reached. The defendant is, of course, at liberty to answer the bill and contest its averments. When the answer is filed and the proofs are in, the court can discharge or vary the order here made, as justice may require. The demurrer to the bill is accordingly disallowed, and the rule or order, as above suggested in respect to the law action, will be entered.

ORDERED ACCORDINGLY.

NOTE.—In *Mitchell v. Harris*, 2 Vesey, 129, A. D. 1793, it was held that a general agreement in a contract to refer all disputes arising thereunder to arbitrators, was no bar to a bill for discovery of matters under the contract in aid of a contemplated action at law—the lord chancellor observing “that a mere agreement to refer can take away the jurisdiction of any court in Westminster Hall—where no reference has taken place.”

In *Milnes v. Gery*, 14 Vesey, 400, 1807, the master of the rolls, in respect to an agreement to sell real estate at a valuation to be fixed by arbitrators, and where, after several meetings, they were unable to agree either upon the price or an umpire, and where no *mala fides* was imputed, held that a bill for specific performance, praying that the court will appoint a person (its master) to make the valuation, would not lie—the reason being that the vendor had a right to have the price ascertained in the specified mode; distinguishing the case from one of an agreement to sell at a fair valuation where no particular means of ascertaining the value

Tscheider v. Biddle.

are pointed out, and where, therefore, the court is at liberty to adopt any means adapted to the purpose.

In *Morse v. Everest*, 6 Madd. Ch. 25, 1821, it was held that a vendor who agrees to sell at a valuation to be fixed by A, B, and C, cannot be compelled by a court of equity to sell at any other price, but if the vendor refuses to permit the referees to come upon the land in order to fix upon a valuation, equity will remove this impediment and decree the defendant to permit the valuation according to the contract.

In *Greason v. Keteltas*, 17 N. Y. 491, 1858, a lease was made, with a covenant by lessor to pay, at the end of the term, for the buildings, at a price to be fixed by arbitrators, or if he did not pay for the buildings, to renew at a rent to be determined by arbitrators—the lessor refused to appoint arbitrators or take any steps towards an appraisal, and he was held liable as at law for the value of the buildings on a valuation fixed by the court, the court observing that the case was not one in which there could be a specific performance, since “the covenant to renew is entirely dependent on the failure to pay [for the buildings], and there could be no such failure until the value was ascertained, and the only decree for a specific performance which the court could make would be one compelling the defendant to choose an appraiser—it being well settled that courts of equity will never entertain a suit to compel parties specifically to perform an agreement to submit to arbitration”—citing *Gourlay v. Duke of Somerset*, 19 Vesey, 431; *Agar v. Macklew*, 2 Sim. & Stuart, 418; *Mitchell v. Harris*, 2 Vesey, 129.

The case of *Greason v. Keteltas*, *supra*, was followed in *Hopkins v. Gilman*, 22 Wis. 476, 1868, where a decree compelling the lessor to choose an arbitrator to fix the rent was reversed, and it was held that the agreement to renew could not be specifically executed, and that the lessee was entitled to have the value of the improvements determined by the court (though the lease provided they should be determined by arbitrators), and to restrain the lessor's action for possession until the payment of the value of the improvements.

In *Biddle v. Ramsey*, 52 Mo. 153, 1873, on a lease like the present, where the lessee refused in bad faith to appoint a disinterested arbitrator and remained in possession, held that a bill in equity would lie by the lessor for the settlement of the rights of the parties.

A court of equity will not enforce an agreement to submit a question or dispute to arbitrators: *Tobey v. County of Bristol*, 3 Story, C. C. 800, 1845, where the grounds of the doctrine and the cases in its support are given.

The effect of agreements to refer disputes to arbitration is settled in England by the case of *Scott v. Avery*, 5 H. L. Cases, 811; and the doctrine of that case, as understood by the English court of appeals, will be found clearly stated in *Dawson v. Lord Otto Fitzgerald*, 9 Law Rep.

United States v. Pacific Railroad.

Exch. 7; S. C. 3 Cent. Law Jour. 477. See, also, *Yeomans v. Girard, etc. Ins. Co.* 3 Cent. Law Jour. 792, and cases cited; *Randel v. Ches. & Del. Canal Co.* 1 Har. (Del.) 275; *Contee v. Dawson*, 2 Bland (Maryland), 273; *Gray v. Wilson*, 4 Watts (Pa.), 39; *Howe v. Dennis*, 3 Ala. 239; *Scott v. Liverpool Corp.* 3 De Gex & J. 334; *Caledonian, etc. Railway Co. v. Granoch, etc. Railway Co.* 2 L. R. S. C. App. Cases, 347. Refusal to refer according to agreement, ground of action at law for damages for such refusal: *Livingston v. Ralli*, 5 El. & Bl. 132.

In the principal case, after the delivery of the foregoing opinion, an answer was filed, and the court refused to modify the order staying the law action, after which new assessors were appointed in pursuance of the provisions of the lease, who fixed a rental satisfactory to the parties, and the case was accordingly settled.

UNITED STATES v. PACIFIC RAILROAD.

1. The obligation or duty to pay *taxes* assessed by the United States, is one which may be enforced by suit — by an action at law or a bill in equity, according to the nature of the relief sought.
2. In such a suit by the United States, the defendant cannot plead a set-off, legal or equitable, growing out of independent claims against the United States, although such claims are just, and have been presented to and rejected by the proper auditing officers.
3. The remedy against an illegal tax assessed by the United States, pointed out.

(Before MILLER and DILLON, JJ.)

Suit to Recover Taxes.—Set-off.—Remedy of Tax-payer against an Illegal Tax.

THIS was a bill in equity by the United States to recover the amount of certain taxes claimed to be due, under the internal revenue law, from the defendant company, and to enforce the lien of the taxes upon the property of the company, which, since the taxes accrued, has passed into other hands. Among other defences in the answer, is one in which the railroad company claimed a set-off for a sum exceeding the amount of taxes sued for, growing out of the use of the railroad of the defendant by

United States v. Pacific Railroad.

the government during the war; which claim, it is alleged, has been duly presented to the proper department of the government and rejected. This portion of the answer was excepted to by the United States; and it was in disposing of these exceptions that the following opinion was orally pronounced by Mr. Justice MILLER.

Mr. W. H. Bliss, district attorney, for the United States.

Messrs. Cline, Jamison, & Day, for the defendant.

MILLER, *Circuit Justice*, orally.—The United States brings suit against the Pacific Railroad Company for the collection of a tax alleged to be due by the railroad company, and to enforce the lien of this tax upon the property of the company, which has passed into other hands. The railroad company sets up as one of its defences that it has a claim against the United States in excess of the amount of these taxes, for the use of the railroad and its appurtenances during the war, which has never been paid; and it alleges, also, that these claims have been presented to the proper auditing officers and rejected; and it is insisted that they come within the statutes of the United States upon that subject, which allows an equitable set-off where just claims have been rejected. And the defendant also claims that the government, being a plaintiff, and bringing this action in chancery in the nature of an action for a debt, the suit is liable to the principle of mutual set-off, which governs all suits in equity. A good deal of argument on both sides has been presented to us upon the question whether an action to recover taxes is an action of debt, and whether an obligation to pay taxes to the government is a debt. There is considerable conflict of authority on that subject. Not only is there such conflict in the courts other than those of the United States, but the supreme court of the United States, in at least two cases, has given what might appear to be conflicting decisions upon the subject. In the case of *Lane County v. Oregon*, reported, I believe, in 7 Wallace, which was a suit to recover taxes, the state of Oregon claimed that her

United States v. Pacific Railroad.

taxes should be paid in gold, and that the legal-tender laws then in existence, and in existence long before, had no application to taxes, whether state or national, except as they were made receivable for dues to the United States by the act itself. And the question turned on whether the taxes which the state of Oregon assessed against her citizens was a *debt* within the meaning of the legal-tender laws, which provided in terms that they should be receivable in payment of all debts. The supreme court unanimously held that in that sense, at all events, and for that purpose, a tax was not a debt. In other words, the meaning of it was that the congress of the United States did not, by the use of the word "debt" in that act, intend to include taxes of the states. Chief Justice CHASE delivered the opinion, and he referred to several of the authorities cited yesterday on the subject whether a tax is a debt or not. On the other hand, in a later case, found in 19 Wallace, 227, coming up from Pennsylvania, where the United States brought an action at law for some internal revenue taxes, a recovery was stoutly resisted on the ground that a tax was not a debt, and as it was not a debt within the common law meaning of the phrase, that it could not be so collected. In that case the supreme court held that, for the purposes of that collection, and in some senses, it was a debt; that the tax — which, I presume, was the same kind of a tax as this is — could be so collected. Whenever the proper officers themselves ascertained their earnings for that particular year, the law applied and made the assessment; it could be neither more nor less than that amount, and no assessment by the officers of the government was necessary to ascertain the amount; therefore, it is a debt collectible by suit. I state these things merely to show the difference of opinion that has existed upon the subject, as also to show the fact that the supreme court has, under one set of circumstances, recognized that a tax is a debt, while under another that it was not a debt. In the view that all of us here take, I think, however, that this discussion is immaterial. It is immaterial what you call the obligation of a citizen to pay his taxes; it is very

United States v. Pacific Railroad.

clearly an obligation which may be enforced by the courts. In the case from the state of Pennsylvania, it was simply a suit for taxes, and nothing else; but if it was not such a suit, an equitable lien, it is claimed, would give the right in chancery to recover what was merely a debt at common law. The question remains whether it is liable to a set-off. This depends upon a principle of policy, in which both the government of the United States and its courts have sounded no uncertain note at any time. We have even, without the aid of an act of congress, refused to grant an injunction to stay the collection of taxes under any circumstances — and this upon the broad ground applicable to this case, that the taxes of the government are essential to the support and existence of the government; and we have always refused to permit any interference with their collection by injunction. The principle involved is this: That by setting up other debts, and cross-actions and counter-claims against the government, it would, in effect, be placing the existence of the government at the mercy of any person who chose to set up his right in this way, and thus hinder the collection of the taxes. Since that decision was originally made, the statutes passed by congress go very strongly in that direction. Congress has passed a statute expressly forbidding the granting of an injunction for that purpose. It has passed a statute for the correction of errors of the assessing and collecting officers of the government, which the supreme court has said, in two or three cases, is a complete and perfect system. If the tax is unjustly assessed, or supposed to be unjustly assessed, the remedy allowed is an appeal to the commissioner of internal revenue. If he decides against the party, or fails to decide within six months, the party injured can pay his taxes and go into court and sue for the amount, and recover it back if he is wrongfully assessed, the court being unprejudiced by any action of the commissioner. The statute says he may bring his suit to recover it back, and he will get it back if the court so decides. The time for bringing such a suit is limited, so as to have no delay in settling the matter. It must be within twelve months — six

United States v. Pacific Railroad.

months after the commissioner has decided, and twelve months after the appeal has been taken. And we have said over and over again in our courts that that was a complete and exclusive system of correctional justice in regard to the collection of taxes unjustly assessed; that it was the only system, and by that ruling we abide. There can be no such thing as obstructing and objecting to the payment, as in the case of adjusting the accounts of individuals. It may be said that since the government has refused, by its auditing officers, to allow this party their claim, they have no remedy, and that it is inequitable to allow the government to recover one hundred and twenty thousand dollars against them, when the government owes them half a million. And the argument would have some force, notwithstanding the want of any express provision on the subject, if there were no other remedy. But it is to be considered that the application to the auditing officers is in itself a remedy. They act in a judicial capacity, and are impartial, or supposed to be so, and perhaps are just as good judges as to what ought to be done as we are. But suppose they are not, there remains the right to sue in the court of claims. That court was instituted for this very purpose. But it may be said that the claim set up here is not of a character over which the court of claims has jurisdiction. I cannot see, if it is a claim which can be made a set-off, why it is not a case which can be enforced in the court of claims, because the court of claims has jurisdiction of all claims against the United States growing out of contracts, express or implied. And surely no one can suppose that a claim can be used as a set-off if it does not grow out of a contract, expressed or implied. No statute of any state or of any government, and no principle of law, ever allows any set-off which does not grow out of a contract; so that, in refusing to allow this set-off to come in here and delay the government in the collection of its taxes, we do not leave the party without judicial remedy. The judgment of the court is that the exceptions to the answer which sets up that defence must be sustained.

EXCEPTIONS SUSTAINED.

United States v. Pacific Railroad.

THE UNITED STATES v. THE PACIFIC RAILROAD *et al.*

The internal revenue act of July 13, 1866 (14 Stat. at Large, 104; Rev. Stat. sec. 3186), provides, in reference to certain taxes, that if any person liable to pay the same, "neglects or refuses to pay them after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with interest, penalties, and costs, upon all property and rights of property belonging to such person:" *Held*—1. That a demand is necessary to create and bring into operation this lien. 2. It is essential to such a demand that it should state the amount of the tax and demand payment thereof. 3. That each of the three several demands here alleged was insufficient to create the lien.

(Before MILLER and DILLON, JJ.)

Internal Revenue Act of July 13, 1866 (14 Statutes at Large, 104).—Revised Statutes, Sec. 3186.—Demand of Taxes.—Lien.

THIS was a suit in equity, brought in 1877, under the authority of the statute (Rev. Stat. sec. 3213), which provides for the recovery of taxes by suit and to enforce the lien of the taxes against the property owned by the delinquent (the Pacific Railroad) at the time the taxes accrued (Rev. Stat. sec. 3186). The taxes sought to be recovered, amounting to about twenty-five thousand dollars, accrued in 1871 against the Pacific Railroad. The property of that company has since been sold on a decree of foreclosure, and is owned by and in possession of the other defendants to the bill.

The defendants, the present owners of the property, demurred to the bill, raising, principally, the question of the *sufficiency of the demand* averred in the bill and amended bill, to create or give a lien for the taxes. Three demands are relied on by the government: 1. The letter of collector Maguire, of July 25, 1874. 2. A demand on August 29, 1874. 3. A suit brought in October, 1874, against the lessee of the Pacific Railroad, viz., the Atlantic and Pacific Railroad, for the recovery of said taxes, which suit is still pending, and to which the Pacific Railroad is

United States v. Pacific Railroad.

not a party. The particulars of these several demands appear in the opinion of the court, which was orally pronounced by Mr. Justice MILLER.

Mr. W. H. Bliss, district attorney, for the United States.

Mr. Melville C. Day, for the defendants.

MILLER, *Circuit Justice*.—We have before us the case of the United States against the Pacific Railroad *et al.* It was first submitted on the exceptions to the answer. (*Ante*, p. 66.) The purpose of the bill is to enforce by a decree in equity a lien against the Pacific Railroad Company, and those into whose hands the property has since come, for taxes, which, it is alleged, were never paid and never reported by the Pacific Railroad Company for assessment.

The first proposition which we had to decide was that the defence pleaded as a set-off could not be set up; that no set-off or counter-claim could be set up in any suit against a party in favor of the government for the collection of taxes. The question here involved then came up on other exceptions to the answer.

We soon discovered that the main question to be decided in this case was whether such a demand had been made of these taxes as brought it within the operation of section 3186 of the Revised Statutes, originally enacted on the 13th day of July, 1866, which is that "if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and the rights to property belonging to such person."

Now the main question is, whether such a demand had been made as makes effective the lien mentioned against the property of the Pacific Railroad.

In order that the question might be fully considered by this court on the facts just as they could be proved, the parties concluded to abandon the exceptions to the answer, and the attorney for the government took leave to amend his bill and perfect it

United States v. Pacific Railroad.

so as to set out the exact facts which he claimed to constitute such a demand. He has done so by two amended bills, and the whole question turns upon whether these bills set out a sufficient demand to create a lien for the taxes. The first demand which he sets out is found in a letter of the date of July 25, 1874, from Mr. Maguire, the collector of this district, to the Pacific Railroad Company, which I will read :

"GENTLEMEN :—I beg leave to call your attention to the enclosed copy of the *Internal Revenue Record*, containing a letter from the honorable commissioner of internal revenue addressed to W. H. Sinclair, Esq., collector of Galveston. The letter referred to gives an abstract of the various acts of congress, to which you are referred, meaning taxes on the gross receipts, dividends, interest on bonds, etc., of railroad companies and others. Upon examination of the books of this office, it appears that during a large part of the time covered by these various acts no returns were made by you in accordance with their requirements, and from credible information in my possession it further appears that a large amount is due by your company for taxes, together with the penalty of fifty per cent for neglecting to make the return. I call your attention particularly to the matter of surplus earnings of interest on bonds.

"I am instructed by the commissioner of internal revenue to call upon you for a statement of all taxable amounts which have not heretofore been returned, and to say further that if a proper return is made immediately, with a waiver in writing of exemption from assessment contained in section 20 of the act of June 30, 1864, indorsed across the face of said return, the assessment will be made without the penalty ; otherwise, it will become my duty to report the case to the United States attorney of this district, for collection by suit, with penalty added.

"Any further information that I can furnish you for facilitating this matter will be cheerfully given.

"Your early attention is earnestly requested.

"Very respectfully,

C. MAGUIRE,

"*Collector First District.*"

United States v. Pacific Railroad.

That is the first allegation of the demand. And the amended petition then goes on to allege: "And afterwards, on the 29th day of August, 1874, a demand was made by the said collector in person upon said company for a return of the taxes due; to which demand said company replied that it would make no return, and were prepared to defend."

The third statement of a demand is an allegation that about that time, or shortly afterwards, a suit was instituted by the government of the United States for these taxes, in which the amount due was fairly stated, against the Atlantic and Pacific Railroad Company; and the claim that such a demand is sufficient (not having been made on the Pacific Railroad) was founded on the allegation in the amended bill that the Atlantic and Pacific Railroad Company had become the successor of the Pacific Railroad by virtue of the contract or lease under which it took possession of all its property and agreed to discharge all its debts, including taxes.

I do not think it is necessary to say anything further about that allegation except that it is an allegation of a demand against a corporation different from the one against which these taxes are now sought to be enforced, and different from the corporation which owed the taxes. The Atlantic and Pacific Railroad Company is not a party to this suit. Whether the demand would be good against them or not if they were parties to this suit, it is not necessary for us to say. They never owed the taxes to the government in any other way than by their contract with the Pacific Railroad. It is a very doubtful question whether the government could have made them pay on that contract—that was a contract between them and the Pacific Railroad, and not between them and the government. But, passing that, the case was an action of debt, which is still pending against them. Whether they are liable or not, it seems to me too clear for argument that a demand made upon that company and upon no one else for the payment of taxes due from the Pacific Railroad Company cannot be held to be a demand within the meaning of the statute. The demand is not made

United States v. Pacific Railroad.

against the proper party, and is not made against any party to the present suit.

The next question is as to the demand contained in the letter of Mr. Maguire. The demand in that letter is not, in my opinion, of as much force as the verbal one, taking it just as it is averred. The objection to it is, that, looking at this letter from beginning to end, it is an effort, a request, to have these parties furnish the means by which the amount of the 'tax can be assessed or ascertained against them. There is nowhere a demand that they should come up and pay these taxes; it is only a demand for such information as will enable the assessor, as a preliminary matter, to ascertain the amount of these taxes, and then make a demand for them, or at least then take such steps as the law would allow for the collection of these taxes. The corporation is told, as an inducement to make this report, that if they will waive certain things the penalty of fifty per cent will also be waived. Now, this statement is made upon the authority and request of the commissioner of internal revenue, and, in point of philological accuracy, there is certainly no demand here for taxes.

I will consider some parts of that letter in connection with the next point, which I will proceed to comment upon.

"And afterwards, on the 29th day of August, 1874, a demand was made by said collector in person upon said company for a return of the taxes due; to which demand said company replied that it would make no return, and was prepared to defend."

Now, if it were not for the language "prepared to defend," and that they "would make no return," that is exactly the same as the statement in the letter. It is not a demand for the payment of taxes — there is no demand that you come and pay. It is a demand for a return — that you make a return of the taxes due, by which I suppose they mean a return of the dividends, and the interest and the surplus on which the taxes could be ascertained.

It has, therefore, the same defect, and would be of no more

United States v. Pacific Railroad.

significance than the letter, except that it is argued with some degree of force by the district attorney that, since those returns, or that return, which was demanded, was an essential and necessary foundation on which the government could ascertain the amount of the taxes and make a demand for them, and since they have refused peremptorily to do that, accompanied with the statement that they were prepared to defend—that they would not make any return, but would defend any suit against them—it is said that any further demand is not required; that it was practically a demand and a refusal; and there is some force in the argument. I confess there appears to be more doubt upon it than any of the other matters in the case; and to determine whether that was such a demand as would create a lien upon “all the property and the rights to property” (for that is the language of the statute), we must look at the statute critically.

It is first to be observed that the statute bristles all over with the weapons which are supposed to be efficient to enable the government not only to ascertain what amount of taxes are due from any person or corporation, but to collect those taxes. All the processes which ingenuity can devise have been put into these statutes. Inquisitorial powers, production of books under oath, attachment and imprisonment, seizures and confiscations, are all at the command of the government from the beginning to the end; and all these have in appropriate cases been put into operation unhesitatingly. And this very section, as it stood at the time in regard to which this demand was made, is one of those which is most full of authority conferred upon the collecting officer in regard to that matter. One provision is that “the collector shall, within ten days after receiving any list of taxes, give notice to each person liable to pay any taxes stated therein, etc., *stating the amount* of such taxes and demanding payment thereof.”

Now, if it is necessary to make a man liable to the processes of distraint and seizure, which will be carried out very soon after the notice reaches him—that the notice should state the amount as well as the time when the tax was due—why should

United States v. Pacific Railroad.

it not be necessary that a notice which by an *ex parte* proceeding creates a lien on all the property and rights to property of the defendant, should state the amount, and demand its payment? But no amount is stated. No amount is hinted at. There is nothing in this letter or in any of the demands which would not be satisfied by ten dollars or by ten millions.

There is further to be considered the extraordinary nature of the lien. It is not only a lien upon the land, but it is a lien upon the personal property. It is not only a lien upon property in possession, but upon all rights to property depending upon contracts, and upon unexecuted contracts. It not only creates a present lien, but it relates back:

“Any person, banking association, or corporation liable to pay any taxes, *neglecting or refusing to pay the same after demand*, the amount will be a lien in favor of the United States from the time it is due until it shall have been paid.”

This demand may be made three years or five years after the tax shall become due, and will create a lien which retroacts after five years, and establishes itself upon the real estate and personal property, books, written contracts, and everything that can be taken hold of and identified as the property or rights to property of the defendant.

Now, when the lien as created by the demand is of such character, it is reasonable and it is proper that all the steps which the law requires of the party creating the lien in his own favor shall be pursued strictly. One of the evidences of that must be a demand for the payment of the taxes. Another one, it seems to me, ought to be a demand for the specific amount to be paid.

In all of these alleged demands there is no demand, literally or philologically speaking, for the payment of any tax whatever. There is no demand for any specific amount averred, and surely a lien attended by such consequences as this one ought to have the amount stated with particularity in order to permit its enforcement.

It is to be observed that all this is a very different thing from the collection of the taxes by the ordinary process of distraint,

Ketchum v. Pacific Railroad.

or by a suit against a party for the amount of them. In an action of debt no such demand is necessary for the collection, as the supreme court of the United States has decided, because when the dividends are declared or the interest paid the law annexes to it the obligation to pay five per cent on that amount. But the law does not annex to that any lien on a man's property. The law does not annex to those taxes as taxes *ex proprio vigore* any lien. It is different from the statutes concerning the distillation of spirits, in which the penalties are so heavy and where all the stills, houses, real estate, etc., are made liable from the beginning for the taxes, and a lien created on them from the moment they become due, without any act of the government. Those are different taxes, collected under different circumstances. Here the act that constitutes and creates the lien is the demand. Without the demand there can be no lien, but with a just and proper demand, made in a proper way, the officer creates the lien by the very act of making the demand.

It is not necessary to go any further. We are of the opinion that no such demand has been made as will authorize the United States to come into court by a bill in chancery to enforce a lien created by such demand.

The demurrer of the defendants to the bill of complaint is sustained.

DEMURRER SUSTAINED.

NOTE.—The district attorney took leave again to amend the bill of complaint.

KETCHUM v. THE PACIFIC RAILROAD *et al.*; ST. LOUIS
COUNTY, Intervenor.

1. In 1864, while the state of Missouri was in full possession of the revenue of the defendant's road upon certain express trusts, which, it was provided, were to continue until the state bonds loaned to the company were paid or exchanged, by an act of January 7, 1865, the county of St. Louis was empowered to loan said company its bonds,

Ketchum v. Pacific Railroad.

which was done and accepted by the company. Section 2 of said act authorized the person who had theretofore been in custody of the earnings of the road for the state (called the fund commissioner), to pay into the county treasury, out of said earnings, a sum sufficient to meet the interest on said bonds loaned by said county as it accrued: *Held*, that by said act the state waived its lien and right to all the earnings of the company to the extent of the sum required to pay the interest on said bonds, and that the county was *pro tanto* substituted as to that amount in place of the state, with a lien or charge to that extent as effectual as the state before possessed.

2. As between the company and the county, the effect of the acceptance of the act, and the issue of the bonds by the county under it, was to convert the provisions of the second section into a contract, by which the company consented that the fund commissioner, or his successor, should, out of the earnings of the railroad, pay the sum necessary to meet the interest on said bonds, until they were paid by the company. This created a lien, statutable in its origin and equitable in its nature, on those earnings as they arise, which may be enforced by the county, so long as the bonds which it loaned to the company remain unpaid.
3. If a debtor, by a concluded agreement with a creditor, sets apart a specific amount of a specific fund in the hands, or to come into the hands, of another, from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation, binding upon the parties, and upon all persons with notice, who subsequently claim an interest in the fund under the debtor.
4. The mortgagees under a mortgage made subsequent to the acts of 1865 and 1868, authorizing the lien or charge, with notice of the fact that the county had made the loan, and that it was unpaid, are charged with notice of all the acts contain.

(*Before* DILLON and TREAT, JJ.)

Statutable Lien.—Equitable Charges.—Pledge of Earnings.

PETITION by the county of St. Louis to establish a lien or charge on the fund in court. A general demurrer to the petition was submitted.

Mr. Bowman, Mr. Garesche, and Mr. Clover, for the county.

Mr. Broadhead, Mr. Litton, and Mr. Baker, for the mortgagees.

Ketchum v. Pacific Railroad.

DILLON, *Circuit Judge*.—Under the authority of the act of January 7, 1865, the county of St. Louis issued and loaned to the Pacific Railroad its twenty-years seven per cent bonds to the amount of \$700,000. The railroad company agreed to pay the interest on the said bonds as it fell due, and at maturity to pay the principal. The principal is not yet due, but until the recent embarrassment of the company, it has regularly paid to the county the amount required to meet the interest on the bonds. In 1868 the company made a first mortgage of its property and franchises to trustees, to secure a loan of \$7,000,000, and in 1871 executed a second mortgage, to secure a further loan of \$3,000,000. Subsequently, in 1875, it made a third mortgage, which is the one herein sought to be foreclosed, and in respect of which a decree of foreclosure has been passed, subject to the first and second mortgages, and reserving all the rights of the county of St. Louis. The first and second mortgagees are not before the court on the present application, but the application is resisted by the third mortgagees, between whom and the county of St. Louis the present controversy exists.

The point of contest is this: The county claims that it is entitled to a lien or equitable charge upon the earnings of the railroad company to the extent necessary to pay the interest on the \$700,000 loan, and to continue until the bonds of the county are paid by the railroad company or the purchasers of the property and franchises thereof, under the decree of foreclosure, and that the lien or charge specifically attaches to the earnings of the road, and follows the road into whosoever hands it may pass. On the other hand, the mortgagees maintain that the obligation of the railroad company to the county is unsecured—that it is a debt at large—or, at all events, that the right of the county is subordinate to the rights of the mortgagees and of the purchaser at the foreclosure sale. The question has been very fully and ably argued at the bar. We proceed to state our conclusion, and, briefly, the grounds upon which it rests.

The determination of the point in issue must depend upon the intention of the legislature and of the parties in interest at the

Ketchum v. Pacific Railroad.

time (1865) when the county made the loan. These parties mainly were, the state (which sustained at that time the double relation of sovereign and creditor towards the railroad company), the railroad company, and the county of St. Louis. The intention of the parties must be gathered from the language of the act of January 7, 1865, and the resolutions and acts of the company and of the county in executing the authority it conferred, these being viewed in the light reflected on them by the known circumstances surrounding the parties and the object which was intended to be accomplished.

To these extrinsic circumstances, shown in the legislative history of the road, the briefest reference only will be made. In 1849 the legislature chartered the Pacific Railroad Company with power to build a line of railway nearly three hundred miles long, from St. Louis to Kansas City. In 1851 the work of construction commenced, and in that year, and down to 1855, the legislature had passed acts loaning the credit of the state to the company to aid and secure the completion of the road. This aid was in the shape of state bonds, having not less than twenty or thirty years to run from the date of their issue. The company agreed to make provision for the payment of these bonds, interest and principal, and the state was secured by a statutable lien, with power of sale. Down to and during 1855, \$7,000,000 of state bonds had been issued. Down to 1861, when the rebellion broke out, only about one hundred and eighty miles of the road had been completed. The civil war suspended the work of constructing the road; nor was the work resumed until the legislature passed the act of February 10, 1864 (Laws 1864, p. 50), which has a material bearing upon the present controversy. This act authorized the company to borrow \$1,500,000 to complete the road, to be secured by a first lien on the line west of Dresden, the state waiving for this purpose and to this extent its prior lien. The money was obtained, and while the company was extending its road, in 1864, the road was "raided" by the insurgent forces, and further aid was needed, both to repair the injuries and to complete the line. The act of February 10, 1864,

Ketchum v. Pacific Railroad.

contains provisions in respect to the fund commissioner, who is referred to in the act of January 7, 1865, which it is essential to notice. The office of fund commissioner was created by the act of 1864, which provided that the office "shall continue until bonds (*i. e.* the Dresden bonds, so called) issued for the completion of the road, 'and the said state bonds loaned to the said company,' with interest thereon, are fully paid or exchanged for the first mortgage bonds of said road,*as hereinafter provided."

"SEC. 2. All gross earnings of the road, from all sources, shall be paid in, daily, to said fund commissioner, and all other sources of revenue shall be under his control and possession as they arise."

This officer was to pay out all moneys for construction and equipment and for operating the road. The duty of this officer in the application of the net earnings of the road is prescribed by section 7, as follows: 1, his salary; 2, interest of first mortgage bonds exchanged under the act; 3, dividends on the preferred stock, which the act authorized to be created, and the surplus to the purchase of outstanding state bonds. The state was thus, in 1864, in full possession of all the revenues of the company upon certain express trusts, and this possession it was contemplated and provided should continue until "the state bonds loaned to the railroad company," having still many years to run, and upon which the Pacific Railroad Company had paid no interest since July, 1859, were paid or exchanged. It may be implied from the legislation of March 31, 1868, hereafter adverted to, that the holders of state bonds did not exchange them for bonds of the company under section 6, nor convert them into preferred stock under section 8, of the act of February 10, 1864. Now, in this condition of affairs—the state, by its fund commissioner, in possession for its own security of all the revenues of the road, the road without credit and in a ruinous condition, and its line uncompleted, the funds derived from the Dresden bonds exhausted, and further aid being necessary—the act of January 7, 1865, was passed, the object of which was to secure the needed assistance by the loan to the company of the

Ketchum v. Pacific Railroad.

credit of St. Louis county to the extent of \$700,000. Section 1 of the act last named authorized, but did not require, the county court to loan the company its seven per cent twenty-years bonds "for the completion of the road," upon such conditions as the county court and the directors of the company might agree upon, subject, of course, to the provisions of the act itself. The county court accepted the act. The board of directors of the company likewise accepted it, and agreed to observe and faithfully perform its obligations, and soon afterwards the bonds of the county were issued and the proceeds used by the company to complete its road. The road was finished the following year, and the interest on the bonds has been paid by the company to the county down to and including May, 1876.

What provision was made to secure the county for this large loan to the company? It was not a gift or donation by the county. It was not a purchase by the county of the stock of the road. The act only authorized the county to loan its credit or bonds to the company. The company was, as we have seen, in no condition to meet the interest on the bonds unless the provisions in the act of 1864 for the sequestration of its revenue by the state, and for the benefit of the state, were modified. Hence we see the object and necessity for the second section of the act of January 7, 1865. It can hardly be supposed that the county would loan this large sum to a company whose property was already mortgaged to the extent of nearly or over ten millions of dollars, including unpaid interest, and all whose revenues were appropriated and actually going into the possession of the state, and were to continue to go there until the large debt to the state was paid. Accordingly, we find that the second section of the act made, and was intended to make, effectual provision for the security of the county. That section is as follows:

"SEC. 2. The fund commissioner of the Pacific Railroad, or such person as may at any time thereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of the Pacific Railroad Company,

Ketchum v. Pacific Railroad.

\$4,000, and \$1,000 additional in each month of December, to meet the interest on said seven hundred bonds; said payment to continue until said bonds are paid off by the Pacific Railroad."

Now, the effect of this section, when accepted and acted upon by the county and company, was simply this: Before this, the state had a complete and perfect lien upon and right to receive all the earnings of the company; but in favor of the county, to the extent of \$700,000, it impliedly consented to waive its lien and right to receive all the earnings, and the county was *pro tanto* substituted as to the \$49,000 per year in the place of the state, with a lien or charge to that extent as effectual as the state before possessed. Why is this not the effect of what was done?

The principal parties in interest in this transaction were the state, the Pacific Railroad, and the county, and they all agreed to the arrangement. As respects the state, the effect of the acceptance of this act by the company and the county was, that the state consented to waive in favor of the county its prior right to the \$49,000 per year out of the earnings of the company. As between the company and the county, the effect of the acceptance of the act and this issue of the bonds by the county under it, was to convert the provisions of the second section into a contract, by which the company consented that the fund commissioner, who had the right to receive all its funds, or any other person who should at any time thereafter have the custody of its funds, should every month, out of the earnings of the railroad, pay the specified sum necessary to meet the interest on the bonds, which payment, it was provided, should continue until said bonds were fully paid by the railroad company. Unless something has since changed the rights and relations of the company and the county, it seems almost too clear for argument that this constituted a specific appropriation by the company, with the consent of the state, of \$49,000 per year of the earnings of the company, in the hands of a trustee, in favor of the county. If the fund commissioner was still "*in esse*," and in receipt of the earnings of the road, can it be doubted that, at the instance of the county, he could be compelled, by *mandamus* or other proper

Ketchum v. Pacific Railroad.

proceeding, to pay the specified sum each month into the county treasury? Here was a consummated contract. The fund out of which the payment was to be made, the amount, the place and purpose of the payment, were all definitely fixed, and the duty of making the payment was absolutely declared. It is certain there was no change in the relation of the parties down to the act of March 31, 1868, by virtue of which the Pacific Railroad, in consideration of \$5,000,000 paid to the state, procured a release for all existing claims, title, and interest of the state in and to the Pacific Railroad and its property. The effect of the act, in this regard, has been authoritatively settled in the case of *Murdock v. Woodson*, 2 Dillon, 188; S. C. on appeal, 22 Wall. 351. It is not necessary to refer more at large to what is there decided. It is only material here to notice that the act of 1868 recites the existence of the debt to St. Louis county, and makes provision for its payment in case the road should be sold. But if it should not be sold, and if the provisions of the fifth section of the act should be accepted by the company, as turned out to be the case, then the company remained *in esse*, and the owner of its property and franchises, and no further provision than then existed for St. Louis county was necessary.

As the act of 1868 made provision for closing the relations of the state as a creditor of the company, it abolishes the office of fund commissioner (sec. 12). It has been contended in argument by the counsel for the mortgagees, that the effect of the repeal of this office was to terminate any trust which the second section of the act may have created in favor of the county; but there is a satisfactory answer to that position, even if the legislative power over the rights of the county be as absolute and unlimited as claimed by the counsel. In the legislation of 1868, the general assembly, so far from evincing an intention to impair or destroy the rights of the county, whenever it made any provision in that regard it was one recognizing and intended to secure and protect those rights. Besides, the contingency of the repeal of the office of fund commissioner was anticipated in the second section of the act authorizing the loan by the county to

Ketchum v. Pacific Railroad.

the company, and provision was made that, in that event, the duty which had before been devolved on that officer should, *ipso facto*, devolve "upon such person as might at any time thereafter have the custody of the funds of the railroad company."

It is our judgment that the effect of the agreement of the company with the county specifically to appropriate its earnings as provided by the second section of the act of 1865, is to create a lien or charge, statutable in its origin and equitable in its nature, on those earnings, as they arise, which may be enforced by the county, so long as bonds which it loaned to the company remain unpaid. This was the view expressed by Mr. Leighton, the attorney of the company at the time, as shown by his letter of January 10, 1865, and, in our opinion, is a sound exposition of the purpose and effect of the act.

It is not necessary to go into the general learning on the subject of equitable liens or charges, since the rights of the parties in the case before us essentially depend upon the construction of the act of 1865. But the accepted doctrine of courts of equity, in respect to equitable liens or charges, will be found, we think, to support the conclusion we have reached. The cases clearly establish this legal proposition. If a debtor, by a concluded agreement with a creditor, sets apart a specified amount of a specific fund in the hands, or to come into the hands of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation, binding upon the parties and upon all persons with notice who subsequently claim an interest in the fund under the debtor.

This proposition would sustain the right of the county in the present case.

It is urged, however, that the mortgagees under the third mortgage had no notice of the rights of the county. But they are bound to notice the acts of the legislature of 1865 and 1868 — the one authorizes the lien or charge, and the other recites the fact that the county had made the loan, and that it was then unpaid. As the mortgage was made subsequent to both of these

Ketchum v. Pacific Railroad.

acts, the mortgagees are charged with notice of all that they contain.

Demurrer overruled, with leave to answer.

TREAT, J., concurs.

ORDERED ACCORDINGLY.

NOTE.—Subsequently the petition of the county was heard on the proofs and elaborately argued, and the following opinion was given:

GEORGE E. KETCHUM *et al.* v. PACIFIC RAILROAD COMPANY *et al.*

In re intervening petition of St. Louis county.

F. J. Bowman and *H. A. Clover*, for the county.

Cline, Jamison, & Day, *contra*.

DILLON, *Circuit Judge*.—Since the demurrer to the petition of the county was determined, the adverse parties in interest have answered, a reply has been filed, and proofs taken. The facts, as reported by the master, have been accepted by both parties as correct, and upon the question whether, under the legislation applicable to this transaction and upon these facts, the county has an equitable lien or charge upon the property sold under the decree, or upon the earnings of the railroad which was thus sold (all rights of the county having been fully reserved in the decree), elaborate arguments were filed at a late day in the term, too late to allow opportunity for an extended examination or deliberate reflection. As our judgment will not be conclusive, and will not be accepted as such by the parties, it is, perhaps, of little consequence what that judgment may be.

We rest it upon what seems to be the manifest and undoubted intrinsic equities arising out of the legislation and peculiar circumstances of the case, without a very close and thorough examination as to whether there are legal obstacles in the way of recognizing and giving effect to these equities.

Upon consideration of the demurrer, we held that the effect of the legislation of the state applicable to this transaction and the acts and contracts of the parties, was to give to the county a lien, statutable in its origin and equitable in its nature, upon the "earnings" of the railroad and upon the road and franchises of the company, as (so to phrase it) the mother of the earnings. We refer to our opinion at that time for a more full expression of our views.

Aside from this, and on general principles, if the doctrine laid down by Lord Chancellor THURLOW in *Legard v. Hodges*, 3 Brown Chancery Rep. 531, 538, "that where parties come to an agreement as to the produce of land, that the land itself will be affected by the agreement,"

Phelan v. Iron Mountain Bank.

and equity will specifically enforce the agreement against the party who makes it and all persons with notice — if this doctrine is sound to the extent stated and applied in that case (see S. C. 4 *ib.* 421), the county is entitled to have the “earnings” arising from the property specifically applied as provided in the second section of the act of January 7, 1865.

It would become a lien or charge upon the earnings and the road, out of which the earnings must necessarily come, effectual against the company and subsequent mortgagees and purchasers with notice (2 Story Eq. Juris. sec. 1231). Whether the county acquired such a lien, and, if so, whether it would take precedence of the rights of subsequent mortgagees, or be liable to be defeated by a sale under a decree foreclosing such mortgages, are close and difficult questions; and, as above remarked, our judgment is given in favor of the county at this time, that the final disposition of the question may not be delayed, and in accordance with what appears to us to be the equities of the case, without being able, in the pressure of other business, to examine the question, in the light of the facts presented in the report, with that care and deliberation which we would be glad to do if it were practicable. Let an order or decree be entered declaring that the county has a right to have the earnings appropriated to pay the interest on its bonds, as provided in the second section of the act of January 7, 1865, and that this charge attaches to the property sold under the decree of foreclosure.

TREAT, J., concurs.

DECREE ACCORDINGLY.

An appeal was allowed, and is now pending in the supreme court.

—

PHELAN, Assignee of Central Savings Bank, v. IRON
MOUNTAIN BANK.

1. Where a bank agreed to act as the agent of another bank for clearing-house purposes, and, as such agent, agreed to pay all the checks of the latter which came through the clearing-house, and received for that purpose, from time to time, the funds of the latter bank, which it passed to the credit of the latter bank, without keeping such funds separate from its own: *Held*, that the relation of debtor and creditor — the ordinary one of the bank to its depositors — was created, and that the deposits could not be considered as trust funds, which, on failure of the former bank, would not pass to its assignee.
2. Under such circumstances, the funds, when deposited, became the property of the bank receiving the same, freed of any trust character; and where the bank that received and credited such deposits

Phelan v. Iron Mountain Bank.

paid, on the day of its failure, the amount thereof to the bank which made the deposit, the latter bank having knowledge of the insolvent condition of the former bank, such payment is an illegal preference, which may be recovered by the assignee in bankruptcy.

(Before MILLER, Circuit Justice.)

Bankrupt Act.—Preferences.—Deposits made with Bankrupt Bank, to meet its Checks in Clearing-House, not a Trust Fund.

WRIT OF ERROR TO DISTRICT COURT. This was an action by Phelan, assignee in bankruptcy of the Central Savings Bank, against the Iron Mountain Bank, to recover the amount of an alleged illegal preference. The cause was submitted on an agreed statement of facts, and judgment was rendered by the district court for the plaintiff. The defendant sued out a writ of error. The bankrupt act provides that "no property held by the bankrupt in trust shall pass by the assignment (Rev. Stats. sec. 5053). The main question in the case arose under this provision. The material facts are stated in the opinion.

Broadhead, with *Donavan* and *Conroy*, for plaintiff, cited: *Bank of Commerce v. Russell*, 2 Dillon, 216; *in re Robert Hosie*, 7 N. B. R. 601; *in re January*, 4 N. B. R. 100.

Wood & Whitney, with *E. T. Farish*, for defendant, cited: *Perry on Trusts*, Par. 2, 18 to 24; *Voight v. Lewis*, 14 N. B. R. 543; *ex parte Sayers*, 5 Ves. Jr. 172; *Grant on Banking*, 4, 5; *Morse on Banking*, 26, ch. 2. As to following trust funds into hands of an assignee: *Cook v. Tullis*, 18 Wall. 342; *Brochus v. Morgan*, 5 Cent. Law Jour. 53; *ex parte Hobbs*, 14 N. B. R. 495; *Hamilton, assignee, v. The National Loan Bank*, 3 Dillon, 230.

MILLER, Circuit Justice, orally.—This case was submitted upon an agreed statement of facts, from which it appears that before the Central Savings Bank, of this city, went into bankruptcy, when Mr. Phelan became its assignee, there was an arrangement between it and the Iron Mountain Bank by which

Phelan v. Iron Mountain Bank.

the Central Savings Bank acted as the agent of the Iron Mountain Bank for clearing-house purposes, the latter being incapable of entering that association for want of sufficient capital. By the agreed statement of facts made up between the parties and submitted to the court, it appears that the Iron Mountain Bank undertook to keep on deposit with the Central Savings Bank a sum sufficient to meet all its checks which that bank should be called upon to put through the clearing-house, and that in the main it did so. And it appears that the Central Savings Bank came under an obligation to the Iron Mountain Bank by which it agreed to pay all the checks of the latter, whether it had money enough of the latter to meet the checks or not; it had to assume that obligation when it agreed to become the agent of the other bank for the discharge of the checks in that way. Through a considerable course of business, the Iron Mountain Bank had at times on deposit with the Central Savings Bank more money than was necessary to pay those checks, and at times less money, but the Central Savings Bank always met those obligations. The Central Savings Bank kept a regular account with the Iron Mountain Bank, debtor and creditor, as it was bound to do, in regard to the transactions. The Central Savings Bank did not keep the funds furnished for that purpose separate and distinct from other funds, but merely passed the amount to the defendant's credit. When the Central Savings Bank failed, or knew that it was going to fail, and after banking hours, it found that it had in its possession, beyond what was necessary to pay the checks of that day, some \$12,000 or \$15,000 on deposit of the Iron Mountain Bank, and it gave them notice to come in and withdraw these deposits, as they would not on the next day protect their checks in the clearing-house. They did come in, and after banking hours the Central Savings Bank paid out, in money and checks, all the deposits of the Iron Mountain Bank.

It is claimed that this was a preference to one of the creditors of the Central Savings Bank, and that the Iron Mountain Bank knew that the Central Savings Bank was in an insolvent and failing condition; and, conceding this knowledge, the only ques-

Phelan v. Iron Mountain Bank.

tion before the court is whether that was a preference within the meaning of the statute. A very ingenious argument is made by the able counsel, Mr. Wood, to prove that this was some kind of a trust fund, a special trust deposit, which it was the duty of the bank to protect from its general creditors, and turn over to the *cestui que trust*, which was the Iron Mountain Bank.

I am not able to see, from the facts in this case, that the transaction possessed that character. I do not perceive any difference between that deposit and the deposit of any individual doing business with the Central Savings Bank. No special trust relation was created by this transaction in question. It does not follow, because a fund is placed in the hands of a man or corporation, that it can be followed everywhere, under all circumstances. And in this particular case there was no means of following specifically the money which was placed by the Iron Mountain Bank in the hands of the Central Savings Bank, because it went into the bank as other money did, was mingled with other money, and paid out in its ordinary business as other money was. There is another consideration which shows that relation between the parties. Why is it that a bank in this or any other city provides clerks to keep accounts, provides and furnishes its depositors a check-book, and goes to a great deal of trouble and expense and liability in securing them against the loss by fire or thieves? Why is it that they do these things, and some go further and pay interest for the privilege of having and holding the money? It is because it becomes their money; because the moment it is deposited there it is their money, and that they may make money out of it in the regular banking business. In this case, the Central Savings Bank not only consented to pay the checks of the Iron Mountain Bank which were drawn against it, but undertook, in addition to what an ordinary bank does, to take care of and protect its operations in the clearing-house. What was it to get for all this? According to the theory of the plaintiff's counsel, Mr. Wood, they were to hold this fund as a separate and distinct trust fund, with which they could make no operations, which they could not loan out, and which they were to

Phelan v. Iron Mountain Bank.

hold until exhausted by checks; and they were to do this for nothing.

The case of the *Marine Bank v. Fulton Bank*, 2 Wall. 252, in which I had the honor of delivering the opinion of the supreme court, is in point, and is decisive of the case at bar. In that case, the Fulton Bank sent to the Marine Bank, of Chicago, two notes for collection. The currency at Chicago had at that time become deranged, and consisted exclusively of bills of Illinois banks. The Marine Bank sent a circular to its correspondents informing them that in the disturbed state of the currency, it would be impossible to continue remittances with the usual regularity, and that it would be compelled to place all funds received in payment of collections to the credit of its correspondents in such currency as was received in Chicago—bills of the Illinois stock banks—to be drawn for in like bills.

The notes were collected by the Marine Bank and placed to the credit of the Fulton Bank. About a year after the collection made, the New York bank made a demand of payment from the Chicago bank, which was refused, unless the former bank would accept the Illinois currency, *now* sunk *fifty* per cent below par. The Marine Bank was engaged, like other banks, in receiving deposits, lending money, buying and selling exchange, and the money collected on the two notes in question was not retained in any separate or specific form. The court held that the proceeds of the notes, when collected, became the money of the collecting bank, and that the depreciation in the currency fell upon that bank. The court, in deciding that case, said :

“But the truth undoubtedly is, as stated in the second branch of the proposition, that both parties understood that, when the money was collected, plaintiff was to have credit with the defendant for the amount of the collections, and that the defendant would use the money in his business. Thus the defendant was guilty of no wrong in using the money, because it had become its owner. It was used by the bank in the same manner that it used the money deposited with it that day by city customers, and the relation between the two banks was the same as that

In re Betts.

between the Chicago bank and its city depositors. It would be a waste of argument to attempt to prove that this was a debtor and creditor relation."

In the case at bar, I cannot see that the relation between the banks was any other than one of ordinary deposit, by which the Central Savings Bank became the debtor of the Iron Mountain Bank, and liable to pay its drafts through the clearing-house. It follows that the assignee is entitled to recover; and the judgment of the district court, being in conformity with these views, is affirmed.

AFFIRMED.

In re BETTS.

1. Where a sale is made, under deed of trust, of a bankrupt's property on which he resides, and the proceeds are insufficient to satisfy the debt thereby secured, so that the right of homestead is cut off, the bankruptcy court has jurisdiction to order the bankrupt to deliver possession of the property to the purchaser, without driving the latter to a suit in ejectment.
2. In equity, a mortgage or deed of trust is only a lien on the land, and an agreement to extend the time of payment of a debt so secured is not within the statute of frauds, and need not, therefore, be in writing.

(Before DILLON, Circuit Judge.)

Bankruptcy.—Homestead.—Jurisdiction of the Bankruptcy Court.—Statute of Frauds.

APPEAL FROM UNITED STATES DISTRICT COURT. This was an appeal from a decision of the United States district court for the eastern district of Missouri, sustaining a demurrer to the bankrupt's answer to a petition of Calvin F. Burnes for an order on the bankrupt to deliver possession of certain property. The facts are stated in the opinion of the court, orally pronounced, as given below.

William R. Walker, for petitioner.

M. Knealy, for respondent.

In re Betts.

DILLON, *Circuit Judge*.—The material facts in this case are briefly these:

Some years ago, about the year 1870, the bankrupt, Betts, purchased a house and lot in this city, 2929 Olive street, of the petitioner, Calvin F. Burnes, and secured a portion of the purchase money by deed of trust, with power of sale by a trustee, on default of payment. The interest was payable at the end of each period of six months. In 1876 Betts was adjudicated a bankrupt, this mortgage debt to Burnes remaining unpaid. Burnes came into the court of bankruptcy, proved his debt as a secured claim, and afterwards applied to the district court, without any express notice to the bankrupt, and on the record here, I may say, without any notice (as the demurrer admits the allegation of the bankrupt in this behalf) of his intention to apply for an order permitting the trustee to sell the property; and such an order was passed by the district court. Thereupon the trustee advertised the property for sale under the deed of trust, and it was sold and purchased by the beneficiary, Burnes, for the sum of five thousand dollars. The sale was reported to the bankruptcy court; the assignee being advised of it, and consenting to its confirmation, it was confirmed, and the trustee and assignee, by the direction of the district court, joined in executing a deed under the trustee's sale, to the beneficiary, for the property.

The property was occupied by the defendant as a homestead. Afterwards, the defendant remaining in possession, and refusing to deliver possession to the purchaser, Mr. Burnes, the latter filed his petition in the district court in the bankruptcy proceeding, setting forth the facts which I have stated, and asking that an order issue from that court to the bankrupt to deliver the property to him, or to appear and show cause why he should not be thus ordered. Thereupon, the order to show cause was served on the bankrupt, and he appeared in the district court and filed an answer to the effect: *First*. Denying the jurisdiction of the district court in the matter, alleging that this property was his homestead, and therefore it was exempt under the bankrupt act;

In re Betts.

that this property was not an asset of the estate that passed to the assignee in bankruptcy, and that the district court as a court in bankruptcy had nothing to do with it, and had no power to make an order in respect of it. *Second.* The answer in substance is this: "I executed my note payable with interest semi-annually, at the end of each six months; and that subsequently Mr. Burnes, the beneficiary, and myself made this arrangement, viz: Mr. Burnes says, 'If you will pay the interest in advance on this loan, I will agree to extend the principal of the debt that long,' and he agreed to it;" and then he alleges that he has paid the interest *in advance* on this debt, and had before this sale paid it in advance down to and beyond the first day of November, 1877, whereby the principal sum of that debt was extended to that time, and therefore the debt was not due at the time when the trustee undertook to exercise the power of sale in this case. He does not allege that that agreement was in writing.

The petitioner, Burnes, filed a demurrer to that answer; and that demurrer was, *pro forma*, sustained by the district court, and an order entered on the bankrupt to surrender possession of the property to the petitioner, Burnes.

From that order the bankrupt brings the case into the circuit court for revision.

The first question is whether, in a case like this, the bankruptcy court has any jurisdiction to make an order of this kind. If, as in many of the states—for example, the state of Kansas, and perhaps many other states—the homestead law exempted the entire property occupied as a homestead from sale on execution, or from liability to pay the general debts, I should very much incline to think it would follow that the bankruptcy court would have nothing to do with it, because the bankrupt law in that event exempts that property from all liability to pay the debts; exempts it in express terms from the property which passes by virtue of the assignment to the assignee; and I think I so held in one case in Kansas, to which counsel referred.

But counsel agree that the homestead act in Missouri is different. There is not unlimited exemption of the homestead in

In re Betts.

this state, but there is exempt in the city of St. Louis a homestead not exceeding in value \$3,000; so that, if this property had been worth \$15,000, and the debt was \$8,000, and it was sold for the sum of \$15,000, the first \$8,000 would go to the mortgagee, the bankrupt debtor would be entitled to the \$3,000 as homestead exemption, and the remainder would be a fund for the benefit of creditors.

It is quite evident that here was an estate which came into the possession of the assignee in bankruptcy. Now, how is the bankruptcy court to pay the debtor unless the bankruptcy court can take possession? The effect of bankruptcy is in reality an execution for the benefit of creditors generally. Unless the bankruptcy court can take possession of that property and sell it, how can it be determined, except by agreement of parties, whether there is anything in the homestead property which belongs to the general estate?

I am of the opinion, therefore, that the bankruptcy court had jurisdiction to inquire into this matter, these parties having gone in there, although Mr. Burnes may not have been obliged to go in and prove up his debt. He has contested the matter in the district court, and submitted to its jurisdiction. The district court had power to take just such proceedings as it did in this matter; and having the power to order this sale, and the sale having been made and confirmed by it, I think, on reflection, the district court is not so shorn of power as to be unable to make that jurisdiction effective; and if the bankrupt should refuse, on a proper sale being made, to deliver possession, I think the court could order it, and would not be obliged to drive the purchaser to an action of ejectment, or to a new suit. That question has heretofore been before me, and I had some doubt about it; but I believe I decided it in the same way, and it came before Mr. Justice MILLER, and it was stated by counsel and Judge TREAT that he ruled the point in the same way.

Now, as to the next question: if, after this debt was created and the mortgage recorded, and the transaction consummated, at a distinctly subsequent period, the parties agree, as is alleged in

In re Betts.

the answer that they did agree, to this effect, viz. : the creditor saying, "If you will pay me interest *in advance* I will extend the principal of the debt," and it was accordingly paid and he received the money, under that agreement the debt would be extended; but if the debt was not due at the time when this power of sale was exercised, nothing would pass by the sale. The power of sale must be strictly exercised, and unless it has arisen, nothing will pass by it. The only point really argued before me in avoidance of this was, it ought to appear here in the answer of the bankrupt that this agreement was in writing, because, the counsel says, "Here is a deed of trust on real estate, and any agreement of that kind that has reference to real estate is within the statute of frauds, and must be evidenced by writing." I know there is one good answer to that—perhaps two. That agreement is set up here, and admitted by demurrer; but, whether that is so or not, the view of the modern law is that a mortgage is, in reality—at least in the view of a court of equity—nothing but a lien; that the creditor here has nothing but a lien on this property for the security of his debt. The main thing here is the debt.

I do not think it is necessary that an agreement to extend a debt should be in writing. If this was verbal, and the creditor received the interest in advance down to November, 1877, this debt was not due. If it was not due, the trustee had no power of sale, and the order of the district court that the trustee might sell, made when the bankrupt had no notice of it, would not conclude him.

It is true for some purposes a bankruptcy proceeding is a unit, and for some purposes a bankrupt may be considered as always being in court; and, accordingly, the supreme court of the United States, in the case decided only a few days ago, on the point as to the jurisdiction of the district court, as well as on the point I am now considering, in the case of *Conro & Carlin v. Orane & Hodgkins*, say: "It must now be considered as settled that appeals do not lie to this court from the decisions of the circuit courts in the exercise of their supervisory jurisdiction under the

In re Betts.

bankrupt law. At the present term, in *Wiswall v. Campbell*, we held that 'a proceeding in bankruptcy, from its commencement to its close, upon a final settlement of the estate, is but one suit. The several motions made and acts done in the bankruptcy court in the progress of the cause are * * * but part of the suit in bankruptcy, from which they cannot be separated.' And again: 'Every person submitting himself to the jurisdiction of the bankruptcy court in the progress of the cause for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding.'"

In *Sandusky v. The National Bank*, 23 Wall. 293, the court decided: "Any order made in the progress of the cause may be subsequently set aside and vacated upon the proper showing made, provided rights have not become vested under it which will be disturbed by its vacation." In that case the assignee in bankruptcy sold certain property to one man, and the sale being reported to the district court it was confirmed; and when the assignee demanded the money, \$40,000, the purchase price, the purchaser would not pay it. He reported this fact to the district court, and stated further, "Parties offer me \$40,500 for this property;" and the district court said, "You may make a sale of it to them," and ordered the sale made and the property delivered to them. A month afterwards the first purchaser went into the bankruptcy court, and asked an order to set aside the sale as against the persons in possession. The district court refused to do it. An appeal was taken to the circuit court, or a petition for a review filed. The circuit court reversed the order of the district court, and ordered the property to be given to the first purchaser, and the district court to pay the money to the second purchasers. That was the case which was taken to the supreme court of the United States, and it dismissed the case for want of jurisdiction, holding that the judgment of the circuit court, whether right or wrong, was conclusive, and that no appeal lay.

This shows a case where there were two purchasers in the bankruptcy court contesting for the property, and that court

In re Betts.

allowed it to be contested in the bankruptcy proceedings, instead of remitting the parties to independent actions. That has a bearing, in relation to the first point, as to the jurisdiction of the court. It has some bearing also on the question that may arise in reference to the second point. I am of opinion, therefore, that the return to the order to show cause—so far as the second branch of that defence is concerned—assuming the facts to be true, as the demurrer admits, is a good ground of defence, and that the demurrer ought, as to that point, to have been overruled.

The question on going back will be: Should the district court, sitting as a court of bankruptcy, entertain this proceeding? I think it has jurisdiction to do it, in its discretion; and if a traverse is made there—if it is denied any such agreement was made, and proofs have to be taken—then the district court, sitting in bankruptcy, may hear and determine that, or it may say, “we will leave the parties to their ordinary remedies.” Because, as we have seen, if the district court takes cognizance of the case as part of the bankruptcy proceedings, its action may be reviewed by the circuit court. But that is the end of it, no matter if the property may be worth a million of dollars; whereas, if the district court drives the party to an ordinary suit, the appellate court is open. He can bring it in the federal court, and if it amounts to more than \$5,000, he can go through all the stages of regular litigation to the supreme court.

Judgment below, which is understood to have been *pro forma*, is reversed, and process will issue to the district court to proceed in such manner as it may be advised.

REVERSED.

Middlings Purifier Company v. Milling Company.

AMERICAN MIDLINGS PURIFIER COMPANY v. ATLANTIC
MILLING COMPANY.

1. Application for an injunction, *pendente lite*, to restrain defendants from an alleged infringement of the Cochrane patent (owned by the plaintiff) for the "new process" of manufacturing flour from "middlings;" the patent having been sustained by a decree of the supreme court, and that decree not having been shown to be collusive, the validity of the patent was considered as sufficiently established to give the right to an injunction; but the injunction was refused because the infringement was not satisfactorily shown.
2. The alleged invalidity of the reissued Cochrane patent on the ground that it contains claims not warranted by the original patents, and on the ground that the invention was not novel, was not shown with such clearness as to justify the court in holding, on a preliminary application, a patent to be void, which had been sustained by the supreme court.
3. The giving of a bond by a defendant as a condition of avoiding an injunction, will not be required, except in a case where, if the bond is not given, an injunction will and ought to issue.
4. Although an injunction was denied, the defendants were required to keep an account of the amount of flour manufactured in their mills, and report the same monthly, under oath, and to submit to an examination of their mills, when in operation, by the plaintiff, its counsel, and expert witnesses.

(Before MILLER and DILLON, JJ.)

Injunction against Infringers in Patent Cases.—Validity of Patent.—Effect of Decree of Circuit and Supreme Court Sustaining a Patent.—Bond as the Alternative of an Injunction.—Order as to Keeping an Account.

THE plaintiff company, as the assignee of the Cochrane patent for the "new process" of making flour from "middlings," filed a bill against the defendant company, and against several other mill owners in St. Louis, charging them with infringing the reissued Cochrane patent, and asking, *inter alia*, for a preliminary injunction.

Answers were filed in all of the cases, assailing the validity of the patent and denying the alleged infringement. Only one affi-

Middlings Purifier Company v. Milling Company.

davit to support the charge of infringement was filed. There were numerous affidavits denying the infringement.

The following opinion was delivered on the application for an injunction.

Rodney Mason, John A. Hunter, and C. H. Krum, for the plaintiff.

George Harding and F. N. Judson, for the defendant.

MILLER, *Circuit Justice*.—The bill in this case charges the defendants with infringing several patents issued to William F. Cochrane, all of which have been assigned to plaintiff. These patents are reissues following upon a surrender of original patents, and they relate to the “new process,” as it is called, of making a superior flour out of middlings, which were formerly rejected, or, if used, were very inferior in quality and value.

The patent of principal importance in the case is for the *process* by which these middlings are purified and converted into flour, and the others are patents for several machines used in the process.

The bill prays for a preliminary injunction, and due notice of the application was given. The case having been fully heard on affidavits and argument of counsel, we now proceed to its decision. It is proper to add that, before the hearing, the answers of the defendants were filed.

The defences are: *First*, that the patents are invalid; and, *second*, that if valid, they have not been infringed by the defendants.

The patents have been found to be valid by the judgment of the supreme court of the United States at its last term, in the case of *Cochrane v. Deener*, and a copy of the record of that case is produced as evidence in this case. And while it is conceded that the judgment in that suit is not an estoppel as to the defendants in this, because they were not parties to the former, it is not denied that it is conclusive on this court as to the principles which it decides, and raises a *prima facie* presumption of

Middlings Purifier Company v. Milling Company.

the validity of those patents, which requires clear and satisfactory proof to the contrary, before it can be rebutted. This proposition was announced in the case of the *American Middlings Purifier Company* (present plaintiff) v. *Christian, post*, on a similar application in the Minnesota circuit court, a few months ago, and we adhere to it now.

To avoid the legitimate effect of that judgment, it is alleged by defendants that the judgment of the supreme court was obtained by fraudulent collusion between the plaintiff and the defendant, imposing upon the court what it believed to be a genuine contest, while in fact it was intended and desired by both parties that the patent of plaintiff should be established by its judgment.

There is, in our opinion, a failure to prove this collusion. The fact that the parties to this suit and others similarly interested have, during the vacation of the supreme court, filed a motion to vacate that judgment on that ground, certainly has no tendency to prove it. And scarcely any more weight can be attached to *ex parte* affidavits purporting to retail, at two or three removes by hearsay, the statements of the counsel of one of the parties to that suit. Nor can a presumption of such collusion arise from the fact that the case was heard on printed argument instead of oral, or that the two counsel of defendant, who each presented a printed argument, did not make it longer or fuller.

These arguments in the supreme court were very fully considered and accurate models were examined. A division of opinion in the court caused a protracted examination of the case, which was before the court after its submission some six months—a very rare thing.

It is next urged that the reissued patents are void because they differ from the originals in important particulars, and contain claims not justified by the originals, and it is said that this question was not before the supreme court. It appears to be true that no such question was considered by the court, and if the showing of the defendants here was such as to convince our judg-

Middlings Purifier Company v. Milling Company.

ment, or satisfactorily prove that the position is well taken, we should give the defendants the benefit of it.

But the action of the officers in the patent office, in making these reissues, must be presumed to be right, and the burden of proving the reverse is on the defendants. They have produced nothing on that subject but the specifications of the original and reissued patents, and insist that it appears clearly from a comparison of these, that the reissue is for a different thing from the original.

The comparison, as thus made, and especially when extended to all the patents relating to the same improvement issued to the patentee on the same day, does not satisfy us that the reissues are void on that ground. They are not, in our judgment, sufficient, in the absence of the original applications in the patent office, to justify us on this preliminary motion and imperfect presentation of the case, to hold patents which have been passed upon by the supreme court, and by the circuit court of Minnesota, void.

The same remarks apply to the next objection to the patents, namely, that they were not novel. The principal evidence offered on this subject is an extract from a French publication, which is said to be now in the patent office at Washington, bearing a date anterior to the date assigned by Cochrane to his invention. The correctness of the translation offered is disputed. The original is not before us. The whole matter is so imperfectly presented, that it would be a gross injustice to hold the patents void without a more extended examination of the matter. It may be observed in respect to both these objections, that, on final hearing, when the issues are clearly made and seen, and the testimony of witnesses subjected to cross-examination, with the aid afforded to the court by models and drawings illustrated by full argument, they can receive that careful consideration of the court which they cannot here, and which is necessary to justify the rejection of the patents.

For the purposes of the present motion, we are bound to treat the patents set up by the plaintiff as valid.

There remains to be considered the question of infringement.

Middlings Purifier Company v. Milling Company.

The case standing at the head of this opinion was heard and argued with four others, brought by the same plaintiff for a like infringement by other defendants. In all these cases, the bills charge the infringement and the answers deny it under oath. It is necessary, therefore, for the plaintiff to sustain the allegation of infringement by a preponderance of evidence. There is but one witness on the part of plaintiff in all the cases. The defendants in each case have introduced several witnesses, who, on oath, deny that the defendants use the process or the machines described in plaintiff's patent. Looked at in this general way, there is the force of the answer and the more numerous witnesses of the defendants, none of whom are impeached, against the testimony of a single witness.

If we examine more closely the statements of these affidavits, it does not appear that Mr. Paige, the witness of plaintiff, ever saw any of the machines of plaintiff, or any model of them, or of the Welch patent. He describes their mode of operation and the process of plaintiff from the language of the patent alone. Conceding that he is sufficiently an expert to understand this, and taking his description of the mode or process of the defendants, some of which he does not pretend to describe except by reference to others, his affidavit is liable to the objection of a want of minuteness and precision in those descriptions. These affidavits are unaccompanied by any models or drawings of defendants' machines, or anything whatever by which the court can institute for itself a comparison of the processes used by the defendants with those patented by plaintiff. This is a very serious defect in the presentation of the case.

When the case in Minnesota was before me, several models were introduced, and the patent which defendant used was brought into court and the actual process of bolting, with the use of the current of air, was put in operation before our eyes. The defendant then claimed that the patent of which that model was an exhibit, antedated that of plaintiff and rendered it void. There was scarcely a question that, if it was not an anticipation of plaintiff's invention, it was an infringement of it. The in-

Middlings Purifier Company v. Milling Company.

fringement in that case was but feebly denied and was manifest. Here it is very different. The infringement is but feebly supported by a single witness and denied by many.

Mr. Paige, himself, seems to recognize two variations of the processes of defendants in all the cases from those of plaintiff. One of these is, that plaintiff describes a process by which the middlings are purified in the first separation from the superfine flour, the meal going through a series of reels and bolting cloths, subjected from the beginning to the current of air, and the middlings, when this part of the process is ended, being left in the reel purified and ready for regrinding. The defendants do not use the air current in the first step of the bolting, but, following the old mode, separate, without the use of the air current, the superfine flour from the middlings, shipstuff, etc., and then taking the middlings, run them through the sieves prepared for the purpose. In the mills of a majority of defendants the current of air is not introduced into the sieve where the middlings are until they have been rebolted several times. The other variation is, that the defendants use the old mode of bolting, by which the meal, as it progresses, passes over cloths, the meshes of which are continuously coarser, while with plaintiff's they grow successively finer.

The result of this is obvious, namely: that the middlings with such heavy particles of bran and other impurities as cannot be driven off by the air-blast, all remain in the bolt in plaintiff's process. These same middlings pass through the bolting cloth in defendants' process and are found in the chest, divided by the relative size of the meshes of the cloth into middlings, shipstuff, etc.

Another variation insisted upon as important by Mr. Harding, is that in all the defendants' processes the current of air is produced by suction, while in plaintiff's they are created by pressure forcing the air into the machine.

We do not think we are called upon to determine with critical accuracy, upon consideration of the doctrine of equivalents, whether these variations which are apparent now are such as to

Middlings Purifier Company v. Milling Company.

exempt the defendants on a final hearing from the charge of infringement. On that hearing, no doubt much that is obscure will be made clear. Drawings and models will be shown, and witnesses subjected to cross-examination. Other competent witnesses will have opportunity to examine defendants' process. The law of equivalents will be discussed as it has not been now. The decision of the supreme court is strong evidence that plaintiff's patent is valid, and is conclusive that Deener, in the use of Welch's patent, infringed it. But it is no evidence that *these* defendants have infringed it. The full burden of proving that rests upon the plaintiff as an entirely new issue of fact. When we consider the consequences to defendants of stopping their mills by injunction at this season of year, that we are asked to do this in a summary manner on a hearing at short notice, without the usual test of cross-examining witnesses, we are of opinion that the case which demands such a grave interference with the business of individuals should be clearly made out and should not rest upon unsatisfactory evidence that the acts charged have been committed. It may be said that, by placing defendants under bonds, as we did in St. Paul, their business can go on without interruption; but we can only require bonds as an alternative, the other branch of which is, that if they do not give bonds, they must be stopped by injunction; we can only demand a bond, therefore, in a case in which, if it is not given, the injunction must issue.

We do not see that such a case is made in regard to the defendants in either of the cases before us. As there is no allegation of present or threatened insolvency in any of the bills or affidavits, and as substantial precautionary justice can be fully attained by requiring the defendants to keep an account and report monthly under oath, and to submit to a thorough examination of their mills, while in operation, by plaintiff, his counsel and expert witnesses, we shall make such an order and deny the injunction.

Judge TREAT, though not constituting a part of the court,

In re Peltasohn.

has heard the case and given us the benefit of his counsel, and agrees to what is here said.

DILLON, J., concurs.

ORDERED ACCORDINGLY.

NOTE.—See *American Middlings Purifier Company v. Christian*, *post*.

In re PELTASOHN.

Where a deficit is shown in the assets of a bankrupt's estate, he must account for it by a satisfactory explanation, or pay the amount of the deficit to the assignee.

(*Before DILLON, Circuit Judge.*)

Bankruptcy.—Accounting for Losses in Business.—Deficit.

THE bankrupts were wholesale millinery merchants in St. Louis. The assignee filed a petition in the district court, representing that the bankrupts had fraudulently withheld from him goods and property to the amount of \$48,000, and asking an order on the bankrupts to show cause why they should not turn over that amount of property to him. The order issued, and the bankrupts appeared and filed a sworn answer denying the charge, and stating that they had delivered to the assignee all their property and effects. The matter was heard by the district court upon the examination of the bankrupts before the register (admitted in evidence without objection, as far as the record discloses), and upon the testimony of various witnesses produced by the assignee and by the bankrupts. The testimony, including the examination of the bankrupts, covers about six hundred written pages. The bankrupts, or their wives, or the persons to whom they alleged that money had been paid just preceding their failure, were not examined as witnesses, or their depositions taken. After a hearing, which occupied several days, the district court found as a fact that the said bankrupts "have secreted,

In re Peltasohn.

concealed, and prevented from coming to their assignee herein, property to the value of \$7,762.22, belonging to the said estate, and thereupon ordered the bankrupts to pay said sum to the assignee on or before the 8th day of September, 1875." The bankrupts, on the 8th day of December, A. D. 1875, filed their petition in this court for a review of the said order. An answer to this petition was filed by the assignee, and the matter, by stipulation and agreement, was to be heard in the circuit court upon the same proofs upon which it was determined by the district court.

By consent, the case was, at the March term, 1876, of this court, referred to S. D. Thompson, Esq., one of the masters in chancery in this court, to report upon the law and the facts. The master has filed an elaborate report, in which he states that he has given to the case a thorough examination, and seems to be of opinion that the finding of the district court against the bankrupts was for a sum too small instead of too large, but as the assignee had prosecuted no proceedings for review, he recommends an affirmance of the order below, with costs, against the bankrupts. Exceptions were taken by the bankrupts to the master's report, on the single ground that it is not sustained by the proofs, and on these exceptions the cause was submitted to the court.

N. Meyers, for the bankrupts.

A. Binswanger, for the assignee.

DILLON, *Circuit Judge*.—It is an admitted fact that at cost price the bankrupts had on hand, on January 1, 1873, goods to the amount of \$41,740.61. They failed in November of that year. Between January 1, 1873, and their failure, they purchased goods to the amount of \$81,589.53, making stock to be accounted for \$123,330.14. These sums are shown by the bankrupts' books. The books show sales, for cash and on credit, during this period, to the amount of \$72,503.95, at *sale* prices. If sold without loss or profit, the bankrupts ought to have had

In re Peltasohn.

on hand at their failure, goods to the amount of \$50,826.19. The amount actually turned over by the bankrupts to the estate in bankruptcy was \$16,500 at cost price, or, including fixtures, \$18,000. The difference, viz., \$34,326.19, or, if fixtures be deducted, \$32,826.19, is to be accounted for.

The bankrupts attempt to account for this large deficit by showing a great decline in the value of goods of this character between January 1 and November 1, and that they had to sell at great loss. Undoubtedly, the old stock—that is, the stock on hand January 1—was not worth its cost price, and sales from that were made, on the average, greatly below cost; but it is very doubtful whether there was much, if any, loss—as likely, indeed, that there was a profit—on the goods sold from the new purchases. On the whole, I am not satisfied with the explanations offered for this large and striking deficit, and I think the district court and the master were well justified in reaching the conclusions they did.

Certain circumstances, pregnant with suspicion, strongly support this conclusion. I mention these without dwelling upon them. The change, during the time they had a bookkeeper, of their system of bookkeeping from double to single entry; the loss or non-production of two important books—"bills receivable and payable," and the "stock or sales book,"—by no means satisfactorily accounted for; the alleged increase by one-half of family expenses during 1873, and taking money therefor, without any real increase being shown; the alleged sending of money to Europe to poor relations, and payments to a relative in this country, not otherwise shown to be true than by the unsupported statement of the bankrupts—this at a time when they were claiming to be anxious to reduce expenses, and when they were embarrassed; and particularly the statement of Peltasohn, that his wife had \$5,000 or \$6,000, and had had since 1871, or before that, which she kept in her house in bank-bills and had never invested—the profits, as he alleged, of business which she had conducted on her own account, and which I must say, under the circumstances, is very improbable; and the further fact that since

In re Peltasohn.

the bankruptcy the bankrupts have gone into business as the professed agents of their wives.

In short, such a case was made against the bankrupts as to call upon them to explain these circumstances of suspicion, and they have not done so. They were not even examined as witnesses on their own behalf in the district court.

The exceptions to the master's report should be disallowed, and an order should be here entered affirming the order of the district court, with costs, and that a mandate go to the district court to proceed with the execution of the order complained of, the same as if the petition for review thereof had not been brought.

ORDERED ACCORDINGLY.

NOTE.—The foregoing opinion, when published in the *Central Law Journal*, was accompanied by the following note, written by Mr. Frank, which we here insert:

"The opposition to the bankrupt law, as it now stands, has come from the creditor-class, and there is, perhaps, but little doubt that the reasons for the opposition are substantial; yet, if the creditors of an estate would urge those provisions of the statute which will secure them their rights, in all proper cases, except in case of composition proceedings, the act would certainly not be without efficacy. The provisions referred to are sections 5110, 5132, and 5104 of the Revised Statutes of the United States.

"*In re Salky v. Gerson*, 11 Nat. Bankr. Reg. 515, S. C. 7 Chicago Legal News, 195, Judge DRUMMOND held, affirming Judge BLODGETT's decision in the same case, 11 Nat. Bankr. Reg. 423, under the provision of section 5104, Revised Statutes United States, section 26 of the act of 1867, that the court had authority to imprison bankrupts for failure to give a satisfactory account and make a full disclosure respecting their property. The counsel for the debtors there contended that if the answers to the inquiries concerning their property were untrue, the creditors might resort to a criminal prosecution. The court replied that criminal prosecution does not pay the claims of the creditors.

"*In re Jacobi*, unreported, Judge CALDWELL committed to jail, at Little Rock, Arkansas, a bankrupt for not paying over to her assignee the sum of about \$12,000, a deficit of that amount not having been by her satisfactorily accounted for. The bankrupt, after being imprisoned for some time, was taken before Circuit Judge DILLON, at Davenport, Iowa, on a writ of *habeas corpus*, who modified the order of the district court as

Paret v. Ticknor.

to the amount to be paid over, as not having been satisfactorily explained, and remanded the bankrupt.

"The case of Peltasohn, above reported, is only one of many where creditors have been imposed upon by bankrupts, because the bankrupts supposed the act to be a shield for their fraudulent contrivances, and the court clearly lays down the rule as to how a true account ought to appear; and in the absence of such an account, to what the act subjects the bankrupts."

JOHN PARET v. MYRON TICKNOR *et al.*

A composition at twenty-five cents on the dollar was effected under section 17 of the act of June 22, 1874 (Stats. at Large, Vol. 18, part 3, p. 178). In the statement of liabilities presented to creditors' meeting plaintiff's claim was represented as fully secured by deed of trust on real estate worth more than the amount of the debt. Plaintiff, being also an unsecured creditor, attended the composition meeting, but did not in any way participate in it, nor dissent from the representation there made as to the value of his security. Long after the composition had been recorded and carried out by the debtors, plaintiff sold the real estate under the deed of trust, and a large deficit was left unpaid. In an action to recover such deficit: *Held*—1. The composition did not, *per se*, extinguish plaintiff's claim, but that he was entitled to twenty-five per cent of final deficit, no matter when ascertained. 2. *Quere*, whether this result would have been changed, even if, in the course of the composition proceedings, the bankruptcy court, at the instance of all the parties, had caused the security to be appraised, and had decided it to be ample to cover the debt?

(Before MILLER and DILLON, JJ.)

Bankruptcy.—Composition.—Effect as to Secured Claims.

THE case was as follows: Action on notes. Defendants pleaded in bar that they had effected a composition in bankruptcy, in manner provided by act of congress; that plaintiff was duly notified of the various meetings and attended the same; that in the statement of liabilities, plaintiff's claim was *represented*, as plaintiff knew, as fully secured by deed of trust on real estate worth more than the amount of debt; that plaintiff

Paret v. Ticknor.

did not dissent or object to such valuation, but acquiesced therein; and that it took all their unpledged assets to pay the composition to the unsecured creditors. Plaintiff demurred to the answer.

John R. Shepley and *Henry M. Post*, for plaintiff, cited: *In re Bestwick*, 2 Chancery Div. Law Reports, 485, affirming same case, 1 Ch. D. 702.

Nathaniel Meyers, for defendants, claimed that the provisions of the English composition act (32, 33 Victoria, Law Journal Statutes, 1869-70, p. 287), under which *in re Bestwick* was decided, differed materially from the act of congress, and cited also *in re J. L. Lytle & Co.* 14 Nat. Bankr. Reg. 457; *in re Becket*, *ib.* 201, and *in re Comstock*, 4 Cent. Law Jour. 145.

MILLER, *Circuit Justice*, orally delivered the opinion of the court, in substance as follows:

Paret was a creditor of Ticknor & Co., against whom proceedings were instituted in bankruptcy. Those proceedings resulted in a composition, under the statute on the subject, by which Ticknor & Co. agreed to pay to their creditors a certain percentage of their debts—twenty-five per cent. Paret was named in the schedule of their creditors, and had notice of the meeting of creditors on this proposition. Ticknor & Co. stated in this schedule that Paret was a fully secured creditor. To this Paret seems to have made no reply in any way, and to have made no objection or given any consent to the compromise. After this, Paret sold the real estate which was the security for his debt, and there remained a considerable balance unpaid of the debt. He brings this suit to collect that balance. It is contended by his counsel that he is entitled to recover all of the debt that was not covered by the sale of the property which was his security. It is contended by counsel for Ticknor & Co. that they were fully discharged by the composition proceedings of any claim on account of that debt.

We are of opinion that the law of the case lies between them.

Paret v. Ticknor.

I am of opinion myself that the compromise provisions of the bankrupt act design that every creditor shall receive the same proportion of his debt; and I am of opinion, as regards the parties who shall receive, that the secured creditor is a creditor for that purpose for all that is not satisfied by his security. And I am of opinion that whenever this fact is ascertained, even after the compromise, that remainder constitutes a debt against the bankrupt, of which he shall pay the same proportion to that creditor that he has paid to the unsecured creditors.

It is here urged very strongly—and the argument is very well put, and it is about the only argument I think worth noticing specially—that Paret, having notice of these proceedings, having notice that the bankrupts had scheduled him as a fully secured creditor, and having taken no exception to that statement, is bound by it. I think Mr. Myers (defendant's counsel) considers it an adjudication of the bankruptcy court, or at least considers it conclusive against the plaintiff that his claim was fully secured. I do not take that view of it. I think it probable, but I am not sure about it, although it is my impression now, that if any adjudication had been made, and either of the parties had brought to the court the question, so that it could be decided whether the security was a sufficient security, and if it was not a sufficient security, for what sum beyond it Mr. Paret had a claim, and that matter had been adjudicated, that that would have been an end of the transaction, and that in the compromise order the bankrupt would not have been compelled to provide for the twenty-five per cent, or for the difference. And if it was decided by the court to be a fully secured debt, and the bankrupt had let it go in that way, then the bankrupt would have parted with all his claim to the property, and the creditor would have accepted it in full payment of the debt. It would have been a judicial settlement of the transaction, in which the bankrupt would be divested of any right to the property, and the creditor would be divested of any further claim personally against the bankrupt. But this was not done, and it follows, I think, that neither of these results was attained. Ticknor & Co. re-

Union Trust Company v. Railroad Company.

tained an interest in that property, and before Paret had finally foreclosed his rights in it they could have redeemed it; and if it had been worth ten times the debt, they would have had the right to redeem it, and have the advantage of the full value above the debt, from the fact that it remains unadjusted. And so Paret gets advantage of the fact that it remains unadjusted. He can foreclose whenever the proper time comes, or whenever by law he will be obliged to do it, and if the property sells for less than his debt he can make Ticknor pay, not the whole of the difference, but twenty-five per cent of it, if the composition is carried out; and if it sells for more than the debt, Ticknor & Co. will be entitled to the surplus.

What would have been the result if the parties had formally agreed in writing that the security was ample, we are not called on to say, but we are of opinion that the mere silent acquiescence of the creditor, his mere failure to dissent, does not affect his claim.

The demurrer, however, goes to the entire answer, and must, therefore, be overruled.

DILLON, J., concurs.

JUDGMENT ACCORDINGLY.

NOTE.—Subsequently (before DILLON and TREAT, JJ.), the plaintiff took judgment for the full amount of the note, with a provision that it might be satisfied by the payment of the twenty-five per cent, if the composition was carried out; if not, then the judgment to stand for the full amount.

UNION TRUST COMPANY v. THE ST. LOUIS, IRON MOUNTAIN,
AND SOUTHERN RAILROAD.

1. A court of equity will not appoint a receiver of a railroad merely upon a showing that there has been a default in the payment of interest, secured by a mortgage of the properties and income of the company, that upon such default the trustees under the mortgage were entitled to immediate possession, that they have demanded possession, and that the same has been refused. It is necessary, in ad-

Union Trust Company v. Railroad Company.

dition to this, to show that ultimate loss will happen to the beneficiaries under the mortgage by permitting the property to remain in the hands of its owners until final decree and sale, if such decree and sale be made.

2. The facts in this case examined, and held not to exhibit such danger to the bondholders as will warrant the appointment of a receiver. The case of *Williamson v. New Albany Railroad Company*, 1 Bissell, 198, followed.

(Before MILLER and DILLON, JJ., at Chambers.)

Appointment of Railroad Receivers.

THIS was an application by the complainant, the trustee in a railway mortgage, for the appointment of a receiver. The material facts appear in the opinion of Mr. Justice MILLER. The arguments were heard, at chambers, in Keokuk, May 31 and June 1, 1877.

Mr. Henry Hitchcock and *Mr. John W. Noble*, for the plaintiff.

Messrs. Glover & Shepley, and *Thoroughman & Warren*, for the defendant.

MILLER, *Circuit Justice*.—The plaintiff is trustee in a mortgage made by the defendant to secure the payment of \$28,000,000 upon six hundred and eighty-six miles of railroad and its appurtenances, and some two or three million acres of land. Of these bonds only about three millions of dollars have been issued, and more than half of these are the property of Baring Bros. & Co., whose interests in the matter are in the hands of S. G. & G. C. Ward. The mortgage was executed and the bonds dated May 6th, 1874. It contained all the usual stringent covenants of a railroad mortgage—among others, an authority to the trustee to take possession of the mortgaged property, which included the income of the road, upon the failure to pay any installment of interest when it fell due, and, after three months of continued default in such payment, to advertise and sell the whole property, rights, and franchises of the company.

Union Trust Company v. Railroad Company.

Plaintiff having filed a bill in the circuit court of the United States for the eastern district of Missouri, to foreclose this mortgage, at the same time gave notice to the defendant of an application to a judge of that court, at chambers, for the appointment of a receiver. This motion is now before us for a decision, upon the bill and the answer of defendant, which has been filed meantime, and upon numerous affidavits on both sides.

We have been aided by full argument from able counsel, and propose now to state, very briefly, the decision of that motion, and the reasons which have governed us in making it.

It is not denied by the answer that there was a failure to pay in full certain coupons of interest falling due at various times between the month of October, 1876, and the time of filing the bill in this case. Nor is it denied that early in April last, on the failure to pay certain coupons then due, a formal demand was made by complainant of the defendant for possession of the road, which was refused. And it is insisted by counsel for plaintiff, that the failure to pay these installments of interest, and to deliver possession of the road on demand, leaves, under the covenants and conditions of this mortgage, no discretion in the court to refuse to place the road in the hands of a receiver—that because the income of the road is pledged by the mortgage for the payment of the bonds, and the plaintiff is authorized, on failure to pay any installment of interest, to take possession; these circumstances, with a conceded default, without reference to the showing of the defendant, without regard to its resources, with no danger of ultimate loss to any bondholders or of any serious delay of payment, require, as matter of law, that the court must dispossess the defendant by the appointment of a receiver to take possession of the property of the company. Whether this is a sound principle or not, is the first question we are to decide. The argument is much pressed that the contract is plain that on failure to pay, the trustee is authorized to take possession, and since possession has been refused, it is the duty of the court to enforce the contract specifically.

If the contract contemplated any very protracted tenure of this

Union Trust Company v. Railroad Company.

possession by the trustee, as, for instance, during the forty years which the bonds have to run before maturity, and a bill were filed looking mainly to the specific enforcement of this part of the contract, equity might be bound to do so. But that is not this case. The possession can, by the terms of the contract, be only temporary, and is auxilliary to other and more important relief. If the default continues for three months, the trustee in possession is bound to advertise and sell the property, so that his possession under the contract can be but for a short time, and is only to enable him to sell and deliver the property, and take care of it in the meantime. The frame of the present bill is very different from this. It abandons the right of foreclosure by a sale by the trustee, and seeks the regular and safer mode of the chancery court. It does not ask that plaintiff be put into possession as of right belonging to the trustee, but that a receiver, plaintiff or any one else, take possession, as the officer of the court. It is plain that any receiver we may appoint is our officer, amenable to the orders of the court, responsible to it for all he does, and completely under its control, his authority resting in the appointment of the court, and not in the contract of the mortgage deed. Hence he cannot sell the road as required by the mortgage, but such sale, if made, is by decree of the court; nor can he pay the overdue coupons to the bondholders without an order from the court. This is no specific performance of that contract for possession, and no such relief is prayed in the bill.

It is also said that the income of the road mortgaged to plaintiff can be secured in no other way than by appointing a receiver, and perhaps this is the surest mode of effecting that purpose. But the income is no more mortgaged than the visible property and the franchises of the company, and, unless there is danger of loss to the bondholders, there is no more reason why the income should be sequestrated than the other property of the company. It is also in the power of the court, without appointing a receiver, to require of the defendant to render account of the income, and, after payment of the necessary expenses, to pay so much as rightfully should be paid to the debt secured by the

Union Trust Company v. Railroad Company.

mortgage. On this branch of this case, some language used by the supreme court in the late case of the *American Bridge Company v. Heidelberg*, 4 Cent. Law Jour. 367, S. C. 4 Otto, 798, is supposed to sustain the ground taken by complainant. In that opinion the court was arguing the proposition that, though the income of a bridge company was mortgaged to secure its bonds, that income might be seized by attachment in favor of others, even pending a suit to foreclose the mortgage, where the mortgagee had taken no steps to appropriate or secure the income. And it is said that, among other modes of preventing this, was the appointment of a receiver. This was predicated of a proper case for the appointment of a receiver, and, though stated by way of illustration, it was not intended to convey the idea that a receiver was the only mode, or that his appointment was to follow in every case of foreclosure where the income was mortgaged.

The usual legal remedies to obtain possession were open to the plaintiff, besides an action for damages for refusing to deliver; and though these may be inadequate, that does not constitute an imperative reason why a court of equity should become active in specifically enforcing a contract which is in its nature a forfeiture of the most stringent character.

We are not of opinion, therefore, that a court of equity is bound in every such case, on failure to pay, to appoint a receiver, without considering other circumstances which have a proper bearing on the question of appointment.

Treating the case as one in which the court must exercise a sound discretion on all the facts before us, we must inquire a little more at length into those facts.

The St. Louis, Iron Mountain, and Southern Railway Company owes its existence to the consolidation of several other railroad companies, which it absorbed, and its road was largely built before the present defendant had a corporate being. Each of the four companies which became so consolidated had heavy mortgages on the pieces of road which it brought into the combined corporation; and the main purpose of the mortgage under which

Union Trust Company v. Railroad Company.

plaintiff is proceeding was to convert these various mortgage debts into one debt and one mortgage, by exchanging the bonds of this new company, secured by the new mortgage on the whole road and all its property, for the bonds issued by the several companies, secured by mortgages on the several parts of the road. For this purpose, twenty-one millions of dollars of these bonds were set apart, to be exchanged for the old bonds, which amounted to that sum.

The new mortgage bound the new company to pay the old bonds, if not exchanged, and to pay the interest promptly on these bonds as it fell due; and a failure to do this was ground for the trustee to enter and take possession, as well as a failure in regard to the new bonds. This part of the programme was a complete failure, as less than two millions of the old bonds have been exchanged for new, after three years of that offer. It became apparent, very soon after the mortgage was made, that the company could not complete its road to its terminus, at Texarkana, Arkansas, where it was expected to unite with the Texas system of railroads, and pay the interest on its bonded debt, and an arrangement was made by which the interest coupons on all old bonds, and the new (except, perhaps, those on one part of the old road), for two years to come, were to be funded and the company relieved from the burden of the interest, temporarily. This carried them past October, 1876. In the making of this arrangement Baring Bros. & Co. were largely consulted, and its success was mainly due to their exertions.

During these two years the road was completed to Texarkana, the floating debt was considerably reduced, and the gross income, as well as the net income, increased more or less every year. In the autumn of 1876, when the first coupons of interest were soon to fall due, not embraced in those to be funded, an examination of the resources of the company showed that they would not be able to pay, out of the regular net income of the road, those coupons as they would fall due through that autumn and the next year.

The agents of Baring Bros. & Co., Messrs. S. G. & G. C. Ward,

Union Trust Company *v.* Railroad Company.

who had been very influential in the management of the road, having also in effect two members in the board of directors, were again freely consulted, and their advice followed, against the views of the president and vice-president of the company. These views were that the company should borrow what money it needed above the net income to pay these coupons, and they alleged that the credit of the company was so good at its home office, in St. Louis, that they would have no difficulty in borrowing the necessary sum. They said that the interest to be paid during the year was about \$1,600,000, and the net income would be about \$1,300,000; and the difference could be borrowed and carried until the company, whose business was increasing, would enable them to pay the interest steadily. They said that the funded debt for interest had several years yet to run, and that the floating debt was easily within their control. They make affidavits now to their belief in the truth of these statements.

The Messrs. Ward did not concur in this view. They said there were deficiencies not noted by the president and vice-president, and mistakes in calculation, both as to existing net income and as to their hopes of the future, which would make the failure in the end more severe and more disastrous. In this divergence of views, two plans were suggested, viz.: By the president and vice-president of the company, that the coupons soon coming due to themselves and to Baring Bros. & Co. should not be presented for payment, while all others should be paid in full; and by Messrs. Ward, that half of each coupon presented should be paid, relying on the leniency of the holders for such extension of time for the other half as should be necessary or useful.

Which of these plans was first presented, and which was the counter-project, is not very well seen; but it is very clear that, against the views of the president and vice-president, the plan of Messrs. Ward prevailed, and was acted on. All, or very nearly all, the coupons falling due prior to April 1st, 1877, were presented; half the amount due on each was paid, was accepted and indorsed on the coupons, without objection, so far as is shown, on the part of the holders.

Union Trust Company v. Railroad Company.

Without any notice of change of purpose, as is sworn by the officers of the company, the coupons for the April interest of Baring Bros. & Co. were offered for payment, and the payment of half on each, though tendered, was refused, and within forty-eight hours the present complainant made demand for possession of the road under the mortgage, and that being refused, the present bill was filed immediately, and the application made for the appointment of a receiver.

The bill and the affidavits of the complainants state that the company is hopelessly insolvent; that its property is insufficient to pay its debts; that there is danger that the prior divisional mortgages will be foreclosed on the separate pieces of road which they cover; that in this way a road which, as a whole, may be valuable, will be rendered no security at all for the debt of the Baring Bros. & Co., at whose request this foreclosure was commenced; and that the income of the road, which they are entitled to have appropriated to the payment of their interest, will be diverted to the payment of a floating debt, on part of which the directors of the company are personally liable. No allegation is made of past or present mismanagement of the company or its finances; no dishonesty or fraud is charged, and no misappropriation of the funds of the company.

The answer of the defendant, supported by numerous affidavits, controverts all or nearly all these assertions of plaintiff. They say that the road itself is now yielding a net income of six per cent on \$28,000,000, while its entire debt hardly reaches \$26,000,000; that, prior to the unreasonable and unexpected attack of the Messrs. Ward, its credit was so good as to enable it to carry its burden without serious difficulty until the income would be ample to pay its interest, its floating debt, and current expenses; that the road is just on the point of reaping the benefit of its completed connections with other roads, east and west; that besides the road, its rolling stock and appurtenances, the company own lands, subject to the mortgage, to the value of \$8,000,000, which is apart from the road, whose value, estimated by its net income at six per cent per annum, is \$26,000,000. They show

Union Trust Company v. Railroad Company.

that the income of the road has steadily increased during the last four years, so disastrous to railroads generally, and that this is true of the net as well as the gross income.

In this conflict of evidence we must exercise the best judgment we can in its consideration, for it is a matter of which we can know nothing personally. Some things are, however, beyond dispute. It is true that both the gross and net income have steadily increased. It is true that the net income now amounts to six per cent per annum on a valuation of \$26,000,000, which is about equal to all the indebtedness of the corporation. It is true that there are about two million acres of land unsold, the average value of those sold being \$3.50 per acre; and, above all, it is true that the road has been recently finished to points connecting it with the whole system of Texas railroads, and opening up the shortest line for the great cattle trade of that state to its best market. It is also beyond dispute, as shown by affidavits of bank officers, that the banks were ready to loan and carry for the company a large sum, \$500,000, when the tactics of the Messrs. Ward were so suddenly changed.

It is not necessary to impute to the Wards or their principals any other motive than that which usually governs men in moneyed transactions, viz., to make the most of their money. If having, as they do, some seven millions of dollars invested in this road, their contract gives them the right to sell it and buy it in, a court of equity must enforce that right by the foreclosure of the mortgage. And though the consequence of this may be to extinguish some thirty or forty millions of stock held by people who have done no wrong, and place in the hands of Baring Bros. & Co. a road whose future gives every promise of making that stock valuable, we must give them the benefit of the rules of chancery, in enforcing the contract which the parties have voluntarily made. But this refers to the right to foreclose, which depends upon the existence of the default in payment, which is denied. The right to foreclose we do not and cannot decide here.

Unquestionably there may be a right to foreclose without the

Union Trust Company v. Railroad Company.

right to appoint a receiver, or change the possession of the property. This latter depends upon the danger of ultimate loss to the bondholders by permitting the property to remain in the possession of its owners until the final decree and sale, if one is to be made.

Without attempting here to analyze all the testimony, which we have carefully considered, much of which is in direct conflict, we are of opinion that, on what we have above stated to be established facts, there exists no such danger of loss to the parties which plaintiff represents, as to justify us in turning over to them or to a receiver all this immense property. Nor is there anything in the manner in which the owners of it have managed this property, or in their relations (otherwise than that they are debtors) to those parties, which would influence us to go beyond the strict demands of the law. They have placed the financial management of the company for several years almost completely at the control of Baring Bros. & Co. They have solicited and followed their advice in every emergency; and in the latest struggle, which is claimed to have resulted in the default on which this suit rests, they accepted and followed the suggestions of those gentlemen, though opposed to their own views of what was wisest and best.

If authorities are necessary to support a decision, which must largely rest in the discretion of the court, and which in every case must be founded on its own special circumstances, the case of *Williamson v. New Albany Railroad Company*, 1 Bissell, 198, decided by the late Justice McLEAN, will be found to be almost perfect in its analogy to this, and quite so in the principles on which we decide it.

The motion for a receiver is denied.

DILLON, J., concurs.

MOTION DENIED.

Player v. Lippincott & Co.

PRESTON PLAYER, Assignee, v. LIPPINCOTT & Co. *et al.*

The substitution and registry of a chattel mortgage, correcting a mistake in a prior unrecorded mortgage, is not an illegal preference, but simply an exchange of securities, and falls within the rule laid down in *Sawyer v. Turpin*, 91 U. S. (1 Otto), 114.

(Before DILLON, Circuit Judge.)

Bankrupt Act.—Preference.—Exchange of Securities.

APPEAL FROM THE DISTRICT COURT. The plaintiff is the assignee in bankruptcy of Benjamin R. Lippincott, and brought this suit to set aside a chattel mortgage, dated November 15th, 1876, recorded November 18th of the same year, executed by the bankrupt to the defendants. On final hearing the bill was dismissed by the district court, and the assignee appeals.

The facts are stated more at large, and the opinion of the district court is reported, in 5 Cent. Law Jour. 260, and in the subjoined note.

G. M. Stewart, for the appellant, the assignee.

E. T. Allen, for the appellees, the mortgagees.

DILLON, Circuit Judge. — I find, from the proofs, that the mortgage of August 28th was actually delivered; that there was no agreement that it was not to be recorded or kept secret, and that there was no understanding that the mortgagor might sell the property mortgaged in the usual way. I further find that the mortgage was given to secure a *bona fide* debt, and that it was not made or taken in contravention of the bankrupt act. It contained a clerical error as to the amount of the note secured thereby, and for that reason the second mortgage on the same property was executed and acknowledged, November 15th, and recorded November 18th. The petition in bankruptcy was filed within two months after the execution and recording of the corrected and substituted mortgage, but more than four months

 Player v. Lippincott & Co.

after the execution of the first mortgage. No possession was taken under either mortgage.

The statute of Missouri (1 Wag. Stats. 281, sec. 8), is not essentially different, in the respect here involved, from the statute of Massachusetts; and I am of opinion that the district judge was clearly right in considering this case as governed by the judgment of the supreme court in *Sawyer v. Turpin*, 91 U. S. R. (1 Otto), 114. I can perceive no solid grounds on which to distinguish them. The mortgagee's security, upon the facts in the case, dates from the execution of the original mortgage, which was more than four months before the commencement of the proceedings in bankruptcy.

AFFIRMED.

NOTE.—

PLAYER, Assignee, v. LIPPINCOTT *et al.*

Preference.—Exchange of Securities.—The substitution and record of a chattel mortgage correctly describing the note secured, for a prior unrecorded mortgage, which incorrectly stated such note, *held* not to be an illegal preference, but a simple exchange of securities, within the rule laid down in *Sawyer v. Turpin*, 1 Otto, 114.

(Before TREAT, District Judge.)

Bankrupt Law.—Preference.—Exchange of Securities.—Chattel Mortgage.

THIS was a bill in equity to set aside a chattel mortgage. The bill alleged the bankruptcy of B. R. Lippincott, by creditors' petition, filed January 9th, 1877; that Charles Lippincott and James Patterson, as co-partners under the style of Charles Lippincott & Co., and doing business in Philadelphia, were creditors of B. R. Lippincott (a brother of Charles), a manufacturer of soda water in St. Louis, in the sum of \$14,480.92; that B. R. Lippincott executed a chattel mortgage to secure a note for said amount, to his brother's firm, on his stock and fixtures, extracts in syrup-room, etc., tools and stock in copper shop, boilers, machinery, and apparatus used by him in the manufacture and sale of soda water; that said note and mortgage were dated August 28, 1876; that the mortgagor and mortgagees agreed that said mortgage should not be placed on record, except in the event that B. R. Lippincott's creditors should press their claims against him; that, pursuant to such agreement, said mortgage was not placed of record until B. R. Lippincott's "insolvency was about to become notoriously public, namely, on the 18th day of November, 1876, when the same was filed and recorded;" that a part of the property mortgaged was stock in trade of the mortgagor, of which he "kept

Player v. Lippincott & Co.

continually selling portions," and replenishing the same with new purchases, and that it was the agreement, intention, and purpose of the mortgagor and mortgagees that the mortgagor should remain in possession of the property mortgaged, carry on his usual business, and make sales of portions of all the property mortgaged, as the exigencies of his business might require; that the mortgagor did so remain in possession of said property and carry on his business until the bankruptcy. There were the usual allegations as to knowledge on the part of the defendants of the mortgagor's financial condition, and purpose to evade the provisions of the bankrupt act.

The answer admitted the bankruptcy, the indebtedness of bankrupt to defendants as co-partners, in the amount alleged, the execution of the note and mortgage; but denied any agreement or understanding that the mortgage should not be placed of record except in case of the imminent insolvency of the mortgagor. The answer further denied any agreement or intention on the part of defendants, that the mortgagor should sell or dispose of, in the conduct of his business, any part of the mortgaged property, and denied that he had sold any part thereof. The mortgage contained the following stipulations: "The parties hereto agree that, until condition broken, said property may remain in the possession of Benjamin R. Lippincott, but after condition broken, the said Charles Lippincott & Co. may, at their pleasure, take and remove the same, and may enter into any building or premises of the said Benjamin R. Lippincott, for that purpose." The answer further denied any knowledge on the part of the defendants of the mortgagor's insolvent condition, either on the 28th of August or the 18th of November. The defendants, in explanation of the delay in recording the mortgage, averred that at the date of the execution of the note and mortgage, defendant Patterson was in St. Louis, on his annual visit to make a settlement with B. R. Lippincott, and took the mortgage with him to Philadelphia for the purpose of exhibiting the same to his partner, before having it placed of record; that on reaching Philadelphia, it was for the first time discovered by Charles Lippincott that, in copying the note into the mortgage, the word "four" had been written instead of "fourteen," in stating the amount of the note, though the amount of the debt had been otherwise correctly stated; that B. R. Lippincott was then daily expected in Philadelphia, to visit the centennial, and it was determined to hold the mortgage for correction until he should come; that B. R. Lippincott did not reach Philadelphia until early in November, and while he was there a new mortgage of the same date, and, with the exception of the error in copying the note, an exact copy of the first, was prepared, signed in Philadelphia by defendant's firm and B. R. Lippincott, and was taken by B. R. Lippincott to St. Louis for acknowledgment and record, and was acknowledged by him in St. Louis, November 15th, and recorded on the 18th.

 Player v. Lippincott & Co.

Stewart & Hermann, for complainant, cited: *Clafin v. Rosenberg*, 42 Mo. 439; *State v. King*, 44 Mo. 242; *Allen v. Massey*, 1 Dillon, 40; *Bryson v. Phœnix*, 18 Mo. 13; *Balke v. Swift*, 53 Mo. 86; *Fant v. Powell*, 62 Mo. 525; *Harris v. Exchange Bank*, 3 Cent. Law Jour. 768, S. C. 14 Nat. Bankr. Reg. 510; *Robinson v. Robardo*, 15 Mo. 459; *Walter v. Winer*, 24 Mo. 68; *Eaton v. Perry*, 29 Mo. 96; *Voorhis v. Langdorf*, 31 Mo. 451; *State v. Tasker*, 31 Mo. 445; *Lodge v. Samuels*, 50 Mo. 204.

E. T. Allen and *N. Oscar Gray*, for defendants, cited: *In re Wynne*, 4 Nat. Bankr. Reg. 23; *Sawyer et al. v. Turpin et al.* 1 Otto, 114, S. C. 13 Nat. Bankr. Reg. 271; *Müller, assignee, v. Jones*, 15 Nat. Bankr. Reg. 150; *Field v. Baker*, 11 Nat. Bankr. Reg. 415; *Burnhisel v. Firman*, 11 Nat. Bankr. Reg. 505; *Cragin v. Carmichael*, 11 Nat. Bankr. Reg. 511, S. C. 2 Dillon, 519; *Nat. Bank of Fred. v. Conway*, 14 Nat. Bankr. Reg. 513; *Hicks v. Williams*, 17 Barb. 523; *Thompson v. Van Vechten*, 6 Bosw. 373.

TREAT, J.—The decision in the case of *Sawyer v. Turpin*, 1 Otto, 114, is conclusive on nearly every point in this case. The prior unrecorded mortgage for which the latter was substituted, would not be upheld if the rights of intervening mortgage creditors or vendees had arisen; but in the absence of such intervening rights, the last mortgage rests for its validity on the first. The facts connected with the two mortgages may be used to throw light on the *bona fides* of the parties.

If the second is, as to date, to be referred to the first mortgage, for which it was substituted, then it was not made within two months of proceedings in bankruptcy. There is nothing on its face to make either mortgage void. Under the statutes of Missouri, it could have no effect as to the creditors until recorded.

If any of the bankrupt's creditors had pursued the property between August and November 18th, their demands might have prevailed over the alleged rights of the mortgagees; but no such rights existed, or, if so, were asserted. The intimation of the supreme court of Missouri, that a mortgage should be recorded within a reasonable time, has reference to cases where intervening interests arise. There is nothing on the face of either mortgage, or in the evidence, showing that the mortgagor was to have the right to sell or consume the mortgaged property for his own benefit, or, in other words, that the conveyance was for his benefit, and, therefore, void. The bill is dismissed with costs.

BILL DISMISSED.

United States v. McKee.

UNITED STATES v. WILLIAM MCKEE.

1. The defendant was indicted, convicted, and punished under section 5440 of the Revised Statutes for conspiring with certain distillers to defraud the United States, by the unlawful removal of distilled spirits from their distilleries, without the payment of taxes (3 Dillon, pp. 546-551; *ante*, p. 1.) In the present suit he was sued *civilly*, under section 3296 of the Revised Statutes, to recover the *penalty* of double the amount of the taxes of which the government had been defrauded by means of the said conspiracy, the two transactions being the same. It was held that the present suit for the penalty was barred by the judgment in the criminal case.
2. The unconditional pardon by the president, of the offence charged in the indictment, is a bar to the present suit.

(Before MILLER and DILLON, JJ.)

Judgment in Criminal Case a bar to a subsequent Civil Suit for a Penalty for the same Offence. — Revised Statutes, Secs. 3296, 5440. — Effect of Pardon.

THIS is a civil action by the United States against William McKee, based upon section 3296 of the Revised Statutes of the United States, to recover the *penalty* of double the amount of taxes on distilled spirits, out of which the government alleges it was defrauded, by means of a conspiracy entered into for that purpose by the defendant and certain named distillers, for the unlawful removal by the distillers of said spirits without the payment of taxes. In these removals it is alleged that the defendant, McKee, aided and abetted. To this petition the defendant pleaded: *First*. That he had been indicted in this court, and convicted and punished for the same offence, and the plea sets forth the substance of the indictment, and the judgment of the court, by which he was sentenced to pay a fine of \$10,000, and to imprisonment in the county jail for two years. This record showed that the defendant was indicted under the Revised Statutes (sec. 5440), and the overt acts charged in the indictment are alleged to be the unlawful removal of the same distilled spirits, without the payment of taxes, for which the penalty here sought

United States v. McKee.

to be recovered is denounced by section 3296 of the Revised Statutes. *Second.* The defendant pleaded a full and unconditional *pardon* by the president, and he exhibits a copy of the pardon with his plea. To these pleas the government demurred, on the ground that they constituted no bar to the present action.

Mr. Bliss, district attorney, for the United States.

Mr. C. H. Krum and *Mr. H. A. Clover*, for the defendant.

MILLER, Circuit Justice.—This is a civil action brought by the government against William McKee, to recover the liability which section 3296 of the Revised Statutes denounces, of double the amount of taxes of which the United States has been defrauded by the unlawful removal of whiskey from the distilleries of divers persons, at different times, within this district.

The petition charges that in all these removals the defendant, in the language of the statute, aided and abetted.

To each and all of these charges defendant makes two defences.

1. That he has been indicted in this court, convicted, and punished for the same offences.

2. That for these offences he has been pardoned by the president, and he exhibits a copy of the pardon with his plea.

To this answer the plaintiff demurs.

In determining the sufficiency of both these defences, it is necessary to ascertain clearly the nature of the offence charged in the indictment for which the defendant has been punished; for if it is the same offence, as defined by law, for which he is now prosecuted, and is also for the same transactions, our laws forbid that he or any one else shall be twice punished for the same crime or misdemeanor.

In the former trial he was indicted for a conspiracy to defraud the government of the United States out of taxes due on whiskey distilled by the several parties mentioned, and that in pursuit of that conspiracy other parties than defendant—who were his co-conspirators—did unlawfully remove said whiskey.

United States v. McKee.

It thus appears that the whiskey was actually removed; that by this removal the government was defrauded of its taxes; that defendant was one of the several persons who conspired together to do this act, though it was not charged that he personally took part in the acts of removal.

In the present case, while he is not charged with a conspiracy by that name, he is charged with aiding and abetting this same removal, and, if convicted, will be punished for the same removals.

We are all of opinion that his joining the conspiracy, of which the purpose was to remove the whiskey, was aiding and abetting the removal which was effected by means of that conspiracy.

How can a man more effectually aid an unlawful act than by counseling and advising its execution, and giving his influence to its support, and the best energies of his mind to devise the safest and surest means of its accomplishment? If three men agree to compass the death of another, and one of them puts their joint purpose into effect, do not the other two aid and abet the murder? and is not such an agreement also a conspiracy to murder the victim?

We are, therefore, of opinion that if the specific acts of removal on which this suit is brought are the same which were proved in the indictment, the former judgment and conviction is a bar to the present action; and we are also of opinion that the allegations of the answer are sufficient averments that they are the same. If the counsel for the United States thinks they are not the same, he can take issue on that plea, and have the issue tried.

Little need be said about the plea of pardon, because if the indictment and sentence of McKee were for the same offences, both in law and in fact, for which this action is brought, it is conceded that the pardon is also a bar to the civil suit. If it is not conceded, we have no doubt that it is so. As it stands in connection with the averments of the answer, we hold it to be a good plea. Whether it would be a good bar to an action for acts not included in that prosecution, but of the same character, we

In re Slevin.

need not now decide, though I have, personally, a strong opinion that it would.

The demurrer is overruled.

DILLON, J., concurs.

DEMURRER OVERRULED.

NOTE.—See *United States v. McKee*, *ante*, p. 1; 3 Dillon, 546-551.

In re SLEVIN, Bankrupt.

Certain real estate of the bankrupt had been mortgaged by him prior to the bankruptcy, with a power of sale in a trustee: the district court ordered that the trustee sell the property and that the assignee join in the sale: the property was sold to the mortgagee and the amount of the bid was credited on his debt: no money was received or paid out by the assignee: *Held*, under the Revised Statutes, sec. 5100, that the assignee was not entitled to commissions on the amount for which the property was sold.

(*Before MILLER, Circuit Justice.*)

Bankrupt Act.—Revised Statutes, Sec. 5100.—Commissions to Assignee.

PETITION FOR REVIEW IN BANKRUPTCY. The district court allowed Mr. Player, the assignee in bankruptcy of Mr. Slevin, \$169.09 commissions on a sale of real estate, and ordered that the same be paid by Mr. Scudder, a mortgage creditor of the bankrupt. It is to reverse this order that the present petition for review was brought by Scudder.

The facts were these: Mr. Scudder held certain notes made by Mr. Slevin, secured by a deed of trust on real estate. Before the notes became due Slevin was thrown into bankruptcy, and when they became due and were not paid, an order of the court was prayed that the trustee should sell the property and that the assignee should join in the sale. The order was made and the property was sold, but did not sell for enough to satisfy the deed of trust. The register, however, allowed the assignee

In re Slevin.

\$169.09 for commissions, which was approved by the district court. It is this allowance which is sought to be set aside by means of the bill of review.

For Mr. Scudder, it was contended that neither Slevin nor the assignee had any interest in the real estate except for any excess there might be above the amount of the deed of trust, and that as there was no such excess, and as the property had never come into possession of the assignee, there was nothing for him to have commissions on. For the assignee, it was contended, on the other hand, that as the assignee was ordered to join in the sale, the whole proceeds passed as much through his hands as through the hands of the trustee.

The bankrupt act (Rev. Stats. sec. 5100), provides that "the assignee shall be entitled to an allowance for his services *on all moneys received and paid out by him*,"—a specified commission.

Mr. Normile, for Mr. Scudder.

Mr. Myers, for the assignee.

MILLER, *Circuit Justice*, in rendering his judgment, observed that he was compelled to differ with the district court. The assignee was not, under the circumstances, entitled to commissions. He was allowed a reasonable sum for what he actually did in signing the deed. Of this no complaint is made. But the assignee claims also a *commission* on the amount bid at the sale by the mortgagee. To this he is not entitled. All that the assignee did was to sign his name to the deed of sale, for which service he had been already paid. The trustee had made the sale, and the only claim the assignee could have under the law (Rev. Stats. sec. 5100), was for money actually received and paid out; and he had neither received nor paid out a dollar. It was claimed that, constructively, the whole amount had passed through his hands, but the fact was that no money had passed at all, as the creditor had bought in the property, which was credited on his debt. The bill of review must, therefore, be sustained, and the order of the district court reversed and set aside.

REVERSED.

REPORTS OF CASES DETERMINED
IN THE
Circuit Court of the United States,
FOR THE
WESTERN DISTRICT OF MISSOURI.

HARRIS, Assignee, v. EXCHANGE NATIONAL BANK OF
COLUMBIA.

A deed of trust intended to give a creditor a preference, fraudulent under the bankrupt act, was executed more than four months before the commencement of proceedings in bankruptcy against the grantor therein; in order to prevent the knowledge thereof from coming to other creditors, and to have it validated by lapse of time, the grantor and beneficiary agreed that it should be kept off the record; after the lapse of four months from the date of the deed of trust, but within four months of the filing of the petition in bankruptcy, the instrument was deposited for record: *Held*, on a bill in equity, filed by the assignee in bankruptcy against the beneficiary to set aside the deed of trust, that the suit was not barred because the proceedings in bankruptcy were commenced more than four months after the execution of the deed of trust.

(Before DILLON, Circuit Judge.)

Bankruptcy. — Effect of Agreement not to Record Mortgage on the Rights of the Assignee.

APPEAL FROM DECREE OF DISTRICT COURT. The material facts appear in the opinion. The bank appeals.

Henry Flanagan, for the complainant (appellee).

Lay & Belch, for the defendant (appellant).

Harris v. Exchange National Bank.

DILLON, *Circuit Judge*. — This is a bill in equity to set aside a deed of trust made by the bankrupt, Bass, for the benefit of the defendant bank and others, to secure about \$26,000. The deed of trust was executed June 14th 1873. It contains an endorsement by the recorder that it was filed for record October 15th, 1873, but it is shown by the proofs *aliunde* that it was not actually spread at large on the records until between December 10th and 17th, 1873. On the 20th day of February, 1874, an involuntary petition in bankruptcy was filed against Bass, and he was adjudged a bankrupt on the same day.

This suit was brought by the assignee in bankruptcy on the 17th day of June, 1874; and the bill, as amended, seeks to set aside the deed of trust on two grounds: *First*, because it is fraudulent under the bankrupt act; *second*, because it was actually fraudulent, being made to hinder and delay creditors.

I think there is no sufficient evidence to overturn the conveyance on the second ground.

As to the first ground, I am of opinion that the proofs show that Bass was insolvent when the deed of trust was made; that the bank knew, or had reasonable cause to know, this fact, and that it intended to secure a preference in contravention of the bankrupt act. I am further of opinion that at the time it was taken it was agreed that it should not be recorded, but should be kept secret until four or six months from its date should elapse, within which it could be attacked under the bankrupt act. Pursuant to this agreement, the bank did not deposit the instrument for record until October 15th (four months and one day), and the evidence tends to show that, out of favor to the bank, the instrument was not actually registered until about the middle of December, just six months after its execution, the officers of the bank being uncertain whether four or six months was the limit. The petition in bankruptcy was filed within four months after the deed of trust was deposited with the recorder.

It is now insisted by the bank that, inasmuch as the deed of trust was executed and delivered more than six months before the proceedings in bankruptcy, it is too late to assail it on the

Harris v. Exchange National Bank.

ground that it was made in contravention of the bankrupt act. In support of this position, it is maintained that the deed took effect from the date of its execution, and not from the time it was filed for record or recorded. (*Gibson v. Warden*, 14 Wall. 244; *in re Wynne*, 4 Bankr. Reg. 5; *Sawyer v. Turpin*, 91 U. S. 114; *Oragin v. Carmichael*, 2 Dillon, 520.)

When the question is not controlled by statutable provision, this is a sound general proposition. But it would be against principle and sound policy, and even shock the moral sense, to allow a creditor, pursuant to an understanding with his debtor, *intentionally* to conceal from other creditors the existence of an instrument which is a fraud upon their legal rights, and for this purpose keep it off the records, to insist that the statute commences to run from the date of the execution of the instrument.

Under the circumstances of the case, I am of opinion that the four months limitation did not begin at least until the 15th day of October (when the deed was filed for record), which was less than four months before the commencement of the proceedings in bankruptcy. This conclusion is supported by many cases, analogous in principle, in which courts of equity have refused to apply the bar of the statute where the fraud has been perpetrated and concealed by the party who seeks to avail himself of the lapse of time. (*Hovenden v. Lord Annesley*, 2 Sch. & Lefroy, 609; *Bailey v. Glover*, 21 Wall. 342; *Hilderbran v. Brown*, 17 B. Mon. 779.) The observations of GASTON, J., in *Hoffner v. Irwin*, 1 Iredell (Law), 490, 498-500, are very forcible, and strongly sustain the view we have taken.

It is probably a sound principle that if secrecy, or an agreement or understanding not to record, for the purpose of concealing the instrument from other creditors, constitutes part of the consideration or inducement to the making of the security, this will taint the same with *mala fides* as to creditors injuriously affected thereby; but, however this may be, it will, at all events, preclude the creditor receiving such security (which is all that it is necessary here to decide) from insisting, as to such other

Anthony v. Jasper County.

creditors, that the instrument takes effect and becomes effectual from the date of its execution, and not from the date of its registry.

This conclusion, viz.: that the deed of trust, as respects creditors, was inoperative until filed for record, is also supported by the registry statute of Missouri (1 Wag. Stats. secs. 24, 25, 26, p. 227), which provides that "no such instrument shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record."

The decree of the district court setting aside the deed of trust is affirmed.

AFFIRMED.

NOTE.—Certain observations in *Sawyer v. Turpin*, 91 U. S. 114, throw some doubt upon what is said in the foregoing opinion as to the effect of an agreement not to record a mortgage; but it is believed there is no necessary conflict between the points really decided in the two cases. The subject is fully discussed by Love, J. (United States circuit court for Iowa, May term, 1878), in *Charter Oak Insurance Company v. Sherman, assignee*. The principal case was not appealed.

ANTHONY v. JASPER COUNTY.

A statute of Missouri (Laws 1872, p. 56) provided that "before any bond hereafter issued by any county shall obtain validity or be negotiated," it must be first registered by the state auditor, who shall certify thereon that all conditions precedent, required by law, and by the contract under which the bonds were ordered to be issued, have been complied with. Subsequent to the passage of this statute, certain bonds were issued by the county court of Jasper county to a railway company, the said company not having fully complied with the conditions upon which the issue of the bonds had been authorized by a vote of the people. In order to evade the statute, the bonds were antedated to a date prior to the passage of the act: *Held*, that they were void, even in the hands of an innocent holder, and that the county was not

Anthony v. Jasper County.

estopped to set up this defence. *Argument.*—Where a statute declares absolutely and without exception that a contract or bond or note is void, it is void into whosoever hands it comes.

(Before DILLON and KREKEL, JJ.)

*Registration Bond Act.—Fraudulent Antedating.—
Innocent Holder.*

THE court made the following special finding of facts, viz.:

1. This action is brought for the collection of interest coupons, originally attached to bonds of the following tenor:

“*United States of America, State of Missouri.*

“No. 1. *Jasper County Bond.* \$500.

“Interest, ten per cent per annum.

“Know all men by these presents: That the county of Jasper and state of Missouri acknowledges itself indebted and firmly bound to the Memphis, Carthage, and Northwestern Railroad Company, or bearer, in the sum of five hundred dollars, which sum said county of Jasper, for and on account of Marion township, for value received, hereby promises to pay said company, or bearer, at the National Park Bank, in the city of New York, and state of New York, twenty years after date, with interest thereon from the date hereof at the rate of ten per cent per annum, payable semi-annually, on the first days of January and July of each year, on the presentation and delivery at said National Park Bank, in said city of New York, state of New York, of the coupons of interest hereto attached. This bond is issued pursuant to an order of the county court of said county of Jasper, made by authority of an act of the general assembly of the state of Missouri, entitled “An act to facilitate the construction of railroads in the state of Missouri,” and approved on the 23d of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township. In testimony whereof, the said county of Jasper has executed this bond by the presiding justice of the county court of said county, under the

Anthony v. Jasper County.

order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same, and affixing thereto the seal of said court. This done at the office of the clerk of said court, this 28th day of March, A. D. 1872.

[SEAL.]

" R. S. MERWIN,

"Presiding Justice of the County Court of Jasper county, Missouri.

" A. E. GREGORY,

"Clerk of the County Court of Jasper county, Missouri.

" CARTHAGE, JASPER COUNTY, — 1872.

"The county of Jasper promises to pay the sum of twenty-five dollars on the 1st day of July, 1873, being interest on bond No. 1, for \$500, payable at the National Park Bank, in the city and state of New York.

" A. E. GREGORY,

"Clerk of the County Court of Jasper county, Missouri."

2. That at the regular term of the county court of Jasper county, Missouri, held on the 10th day of February, 1872, the following, among other proceedings, was had, to-wit:

"Whereas, more than twenty-five persons, tax-payers and residents of the municipal township of Marion, in the county of Jasper, in the state of Missouri, have petitioned this court, setting forth their desire as a township to subscribe to the capital stock of the Memphis, Carthage, and Northwestern Railroad Company, proposing to build a railroad into and through said township; that the amount they desire to subscribe is seventy-five thousand dollars, upon the following named terms and conditions, viz.:

"*First.* That the railroad of said company be continued and extended through said township of Marion, from the depot at Carthage, westward to some point on the Missouri River, Fort Scott, and Gulf Railroad, in the state of Kansas, within nine months from the 1st day of March, one thousand eight hundred and seventy-two, and that the work of grading and constructing be commenced within twenty days after the date of making the subscription, and be pushed vigorously until completed.

Anthony v. Jasper County.

"Second. That the machine and repairing shops of the said company be permanently located and forever maintained within three-quarters of a mile of the public square in Carthage; and said shops, with their equipments, when completed, shall cost not less than three hundred thousand dollars; that the construction of said shops shall begin within sixty days after the cars are running to the depot at Carthage, and be completed within one year.

"Third. That such subscription shall be paid by issuing and delivering of the bonds of said township to the said railroad company; said bonds to be of the denomination of five hundred dollars each, to bear date on the day and year when said railroad company shall become entitled to receive the same under the stipulations herein contained. Aforesaid bonds to bear ten per centum interest per annum from the date they are delivered, the interest payable semi-annually, and represented by the coupons to be attached, the principal payable twenty years after date, and both the principal and interest payable at the National Park Bank, in the city of New York, in the state of New York. 'Said railroad shall be equal to the standard construction of railroads in the state of Missouri, and of the same gauge as the Atlantic and Pacific Railroad.' The aforesaid bonds shall be issued and be placed in escrow, and bear interest as aforesaid from the date of the delivery of said bonds to the aforesaid railroad company.

"Fourth. That when the cars are running regularly on said railroad, for the transportation of freight and passengers, from the town of Pierce City, in Lawrence county, Missouri, into and through Marion township to the depot at Carthage, and thence westward to a point on the Missouri River, Fort Scott, and Gulf Railroad, within the time specified in the first specification herein, to-wit: nine months from the 1st day of March, one thousand eight hundred and seventy-two, and making regular connection with the Atlantic and Pacific Railroad at Pierce City, in the county of Lawrence, in the state of Missouri, and the Missouri River, Fort Scott, and Gulf Railroad, in the state of Kansas, fifty thousand dollars of the said bonds, and when at least

Anthony v. Jasper County.

fifty thousand dollars shall have been first expended and paid out towards the construction of said machine and repair shops, and work begun in good faith for their erection, then twenty-five thousand dollars more of said bonds shall be delivered to said company."

3. That at a special term of the county court of Jasper county, Missouri, held on the 28th day of March, 1872, the following, among other proceedings, was had, to-wit: "In the matter of a subscription to the capital stock of the Memphis, Carthage, and Northwestern Railroad Company, in behalf of Marion township:

"Whereas, it appearing from the returns of an election, held in pursuance of an order of this court, on Tuesday, the 5th day of March, A. D. 1872, that more than two-thirds of the qualified voters of the municipal township of Marion, in Jasper county, Missouri, voting at said election, are in favor of subscribing to the capital stock of the Memphis, Carthage, and Northwestern Railroad Company seventy-five thousand dollars, upon the terms and conditions as set forth in the petition heretofore presented, and the order of this court, made on the 10th day of February, A. D. 1872, for said election, and that more than two-thirds of the voters of said township voted in favor of such subscription being made; now, therefore, it is ordered by the court that the sum of seventy-five thousand dollars be, and is hereby, subscribed to the capital stock of said railroad company in behalf of said Marion township, according to the terms and conditions of said order of election, and that the bonds to be issued in payment of such subscription be signed by the presiding justice of this court, and attested by the clerk of this court, with the seal of this court affixed."

4. That at an adjourned term of the county court of Jasper county, Missouri, held on the 4th day of June, A. D. 1872, the following, among other proceedings, was had, to-wit: "Ordered by the court, that fifty thousand dollars of Marion township bonds, voted to the Memphis, Carthage, and Northwestern Railroad Company, be issued, and that the clerk of this court have

Anthony v. Jasper County.

the same registered according to law, and that when so registered the same shall be deposited in escrow in some responsible banking house in the city of St. Louis."

5. That an act of the general assembly of the state of Missouri, entitled "An act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof," approved March 30, 1872, enacted *inter alia*:

"SECTION 4. Before any bond hereafter issued by any county, city, or incorporated town, for any purpose whatever, shall obtain validity or be negotiated, the same shall be presented to the state auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the state bonds are now registered, and who shall certify by endorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with; and the evidence of that fact shall be filed and preserved by the auditor. But such certificate shall be *prima facie* evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary, in any suit or proceeding to test or determine the validity of such bonds, or the power of any county court, city or town council, or board of trustees, or other authority, to issue such bonds; and the remedy by injunction shall also be at the instance of any tax-payer of the respective county, city, or incorporated town, to prevent the registration of any bonds alleged to be illegally issued or founded on any provisions of this act."

6. That John Purcell was the presiding justice of the county court of Jasper county on the 28th day of March, 1872, and continued to hold said office until the — day of September, 1872, when he resigned; and that R. S. Merwin was a member of the said county court in March, 1872, and until the 21st day of October, 1872, when he became, and thereafter was, presiding justice of said court; and these facts appear by the records of said court.

7. That the bonds in controversy were sealed with the seal of

Anthony v. Jasper County.

the county court of Jasper county, affixed by the clerk and signed by the clerk, and at the same time said bonds were signed by the said R. S. Merwin, which was after he became presiding justice of said county court, in October, 1872. Merwin delivered the said bonds in October, 1872, to the Union Savings Association, of St. Louis, for the use of one Edward Burgess, a contractor for the building of the railroad named in the bonds, having first removed the first two coupons; and the said bonds were purchased by one William C. Wilson from said Burgess at the rate of fifty-five cents on the dollar, which was then the market value of said bonds, and the same were paid for in November, 1872, by the said Wilson giving his check to Burgess for the amount (\$27,500) on said savings association, which check was paid. Neither the other justice of the county court, nor the county court, consented to the said delivery of the said bonds by Merwin to or for the use of Burgess. The said railroad for which the bonds issued was finished through Marion township, but the said railroad company has never complied with the condition of the vote requiring its railroad to be continued and extended through said township of Marion, from the depot at Carthage, westward, to some point on the Missouri River, Fort Scott, and Gulf Railroad, in the state of Kansas, and there still remains about nine miles of such railroad to be constructed in Kansas.

8. That said bonds, when signed, sealed, and delivered as aforesaid, were antedated so as to bear date the 28th day of March, 1872, and they were never presented to the state auditor, and he never registered the same, nor made any certificate thereon, under the provisions of said statute, approved March 30, 1872, and said bonds, as held by the plaintiff, contain no certificate of registration endorsed or written thereon.

9. That the plaintiff is a *bona fide* purchaser of said bonds and coupons for value, without actual notice of any matter of fact impairing the regularity and validity of said bonds, and without actual notice that the said bonds had been antedated so as to bear date prior to the 30th day of March, 1872.

Anthony v. Jasper County.

Joseph Shippen, for the plaintiff.

E. J. Montague, for the county.

DILLON, *Circuit Judge*.—The well-known history of the issue of municipal bonds in this state, as it appears by the many cases in this court, shows that conditions imposed by law requiring a popular vote, or conditions in the propositions submitted to the voters, intended to prevent fraud, and to secure the actual building and completion of the roads, have been often evaded, and the bonds issued without compliance therewith. Such bonds, when negotiated for value, the courts have held to be binding. To prevent such improper or improvident issue of bonds in the future, the legislature passed the act of March 30, 1872. (Laws 1872, p. 56.)

The fourth section of that act provides that “*before any bond hereafter issued by any county * * shall obtain validity or be negotiated,*” it must be *first* registered by the state auditor, who shall certify thereon that all conditions precedent, required by law, and by the contract under which the bonds were ordered to be issued, have been complied with.

In this case the bonds were signed, sealed, and issued in the manner above appearing, *after* this statute went into effect, and were antedated to a date prior to the passage of that enactment. In point of fact, the conditions on which the bonds had been voted had not been fully complied with; and hence they could not have been, and were not, certified by the auditor as registered bonds. The bonds have found their way into the hands of an innocent holder for value, who did not know that the bonds bore a false date.

If the bonds bore date after the act of March 30, 1872, and had not been registered, it is plain, we think, that they would have no “*validity*,” and hence could not support an action in the hands of any person. (Parsons on Notes and Bills, 218, 276, 279.) But they are antedated, and the question is whether they have validity in the hands of the innocent purchaser. Upon the best consideration we have been able to give, our conclusion is that

Anthony v. Jasper County.

the bonds cannot be enforced. The case comes within the doctrine, which is well settled, that where a *statute* declares absolutely and without exception that a contract or bond or note is void, it is void into whosoever hands it may come. This statute declares that no unregistered bond shall be valid or be negotiated. Bonds must *first* be registered. Without registration they "*obtain no validity.*" Such is the statute. A declaration that bonds shall have no validity is equivalent to declaring them to be void.

Is the county estopped to set up this defence? We think not. The case is to be distinguished from those decided by the supreme court of the United States, in which it is held that the frauds of the officers cannot be visited upon the innocent bondholder, and falls within the case of *Bayley v. Taber*, 5 Mass. 286. In that case it was held, where a statute enacted that promissory notes of a certain description, "made or issued" after a specified day, should be "utterly void, and no action should be sustained thereon," that it was competent to the makers of such notes, when sued upon notes bearing date *before* the day fixed by the statute, to prove that they were, in fact, made and issued *after* such day.

The principle of that case is the same as in the case at the bar, and if that is a sound principle when applied to the individual maker of prohibited paper, it should apply with at least equal force in favor of public bodies, where one or two officers, without the consent of the others, may, as in this case, combine to evade the law, the other officers being innocent of wrongful participation.

The principle involved is one of great consequence. For illustration: Loose and general powers have been heretofore given in this state to municipalities and counties to issue such bonds. This power has been taken away by the new constitution. Can the protective provisions of that instrument be evaded and rendered useless by the mere fraudulent act of the officers of the county in antedating the bonds. If so, the power to defraud is endowed with a fearful vitality, which survives the prohibition of the constitution, and threatens to become immortal.

KREKEL, J., concurs.

JUDGMENT FOR THE DEFENDANT.

United States v. Crafton.

UNITED STATES v. CRAFTON *et al.*

Requisites of an indictment for conspiracy to defraud the United States, under section 5440 of the Revised Statutes, considered; and that section held not to extend to a case where the contemplated fraud depends entirely upon the passage of a *future* act of congress to make it effective.

(Before DILLON and KREKEL, JJ.)

Conspiracy to Defraud. — Requisites of Indictment. — Revised Statutes, Sec. 5440, Construed.

DEMURRER to indictment for conspiracy to defraud the United States.

The indictment, in substance, charges :

1. That John D. Crafton, one of the defendants, was, at the time charged, the adjutant-general and acting paymaster-general of the state of Missouri ; that John D. Crafton, Jr., was a clerk in his office ; that the defendants, George M. Irvin, John C. Bender, and Waller Young, were acting as the agents and attorneys for the collection of a claim and demand alleged to be due the members of a certain company of enrolled *Missouri* militia, growing out of their alleged services in the war for the suppression of the rebellion.

2. That, for the purpose of defrauding the United States out of the money alleged to be due for such services, the said defendants conspired together to obtain the payment thereof out of the treasury of the United States.

3. That, to effect the object of said conspiracy, the defendants, Irvin, Bender, and Young, made a false and fictitious muster and pay-roll of said company, and presented the same to the defendant John D. Crafton, as such acting paymaster-general, to audit, approve, and allow the claim contained in said roll.

4. That, to further effect the object of said conspiracy, the defendant John D. Crafton, as acting paymaster-general, did audit, approve, and allow such claim, and issued certificates of indebtedness of the *state of Missouri* for the amount claimed to be due on said roll, and delivered them to the defendant Young.

United States v. Crafton.

5. That, further to effect the object of the conspiracy, all of the defendants transmitted the false and fictitious muster and pay-roll of said company to the third auditor of the treasury of the United States, with the amount on said roll as audited, approved, and allowed, and showing the issue of the certificates of indebtedness therefor, for file by the third auditor of the treasury department of the United States, until such time as congress should thereafter provide for the payment of the fraudulent claim contained in and upon said roll.

6. That, further to effect the object of the conspiracy, the defendants employed Craig and Strong to secure the passage of a bill which had been introduced into the senate of the United States for the payment of said fraudulent claims.

Mr. Mullins, district attorney, for the United States.

Mr. Chandler, Mr. Kemp, and Mr. Lay, for the defendants.

DILLON, *Circuit Judge*.—The indictment is founded upon section 5440 of the Revised Statutes, which is as follows: "If two or more persons conspire * * to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of," etc.

The nature of the acts charged against the defendants in the indictment, are more fully seen by reference to the act of the legislature of Missouri, approved March 19th, 1874, entitled "An act to audit and adjust the war debt of the state." (Laws 1874, p. 102, sec. 10 *et seq.*) The claims "of officers and soldiers of the enrolled Missouri militia" were primarily, and, until assumed by congress, exclusively, against the *state*, and not against the general government. The latter has never assumed their payment. If, at the time that the acts set forth in the indictment were done, the general government had provided for the payment of such claims out of its own treasury, undoubtedly those acts, fraudulent in their nature and object, would have

United States v. Crafton.

been criminally punishable. It is just at this point that the case stated in the indictment is vulnerable. Under the recognized rules of criminal pleading, it is not sufficient to allege generally a conspiracy to defraud; but the nature of the fraud, and, to the required extent, the manner in which, or the means by which, it was to be effected, must be averred. (*United States v. Cruikshank*, 92 U. S. R. 542, 558.) In the case at bar, this has been attempted by the pleader, but the difficulty is that, it appears from the averments, the alleged conspiracy to defraud the United States was, under the existing legislation of congress, legally impossible of execution. The fraudulent muster and pay-roll was transmitted to the third auditor to be *filed*, to await the passage of an act of congress which should provide for the payment of the fraudulent claims contained therein. It was not filed as an existing claim against the United States; on the contrary, the debt to the persons named in the roll was the debt of the *state*, and would remain such unless congress should assume it. It could not be known that such assumption would ever be made, or, if made, that the said rolls would have any legal significance or value.

However fraudulent in ulterior design, or morally reprehensible the acts charged in the indictment may be, still our judgment is that section 5440 of the Revised Statutes cannot be extended to a case where the fraud which the conspiracy contemplated can only be effected in case an act of congress shall be thereafter passed of a nature to fit the prior conspiracy and give it something to feed upon. The demurrer to the indictment must be sustained.

KREKEL, J., concurs.

JUDGMENT ACCORDINGLY.

Briggs v. Johnson County.

BRIGGS *et al.* v. JOHNSON COUNTY.

1. The act of the legislature of Missouri, entitled "An act to aid in the establishment of normal schools," approved March 19th, 1870, is constitutional and valid.
2. The Missouri constitution of 1865, art. IX., sec. 2, provides that, "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free schools for the gratuitous instruction of all persons in the state between the ages of five and twenty-one years." Section 4 is as follows: "The general assembly shall also establish and maintain a state university, with departments for instruction in teaching, in agriculture, and in natural science, as soon as the public school fund will permit:" *Held*, that the fact that the free schools and a state university are expressly mentioned in the constitution, and normal schools are not, does not amount to a constitutional prohibition against their establishment.
3. Normal schools being public institutions, the legislature possesses the right to grant the power of taxation in aid of their establishment.
4. The normal school act of March 19th, 1870, neither violates the principle of equal taxation, nor falls within the constitutional prohibition regarding special legislation.

(Before DILLON and KREKEL, JJ.)

*Municipal Bonds.—Missouri Normal School Act Constitutional.
—Bonds Issued thereunder Valid.*

PLAINTIFFS bring their suit on coupons detached from Johnson county bonds, known as normal school bonds, issued under an act of the legislature of Missouri, entitled "An act to aid in the establishment of normal schools," approved March 19th, 1870. The act declares that, for the purpose of establishing normal schools, the state is divided into two districts; the counties north of the Missouri river constituting the first district, and the counties south of the river, except St. Louis county, constituting the second normal school district. The second section of said act provides: "In each of the districts aforesaid one normal school shall be established, as hereinafter provided, in the county which may offer the greatest inducement by way of build-

Briggs v. Johnson County.

ings and grounds, which shall, however, not be less than twenty-five thousand dollars in value; and any county or city may donate or subscribe to the normal school of the district in which it is located, such sum of money as two-thirds of the qualified voters thereof shall, at a regular or special election to be held therein, determine upon; and to pay the same, may issue bonds running for not less than twenty years, and bearing interest at a rate not exceeding ten per centum per annum, and convert the same into cash at such rates as may be deemed proper by the county court of such county, or the mayor and council of such city; and may also levy and collect such tax as may be required to pay the interest of said bonds and the principal thereof, as the same becomes due." The law further provides for a board of regents, to consist of seven persons, the state board of education and four additional—two from each normal school district—to be appointed by the governor, to which board of regents the general control and management of the normal schools to be established under the act was entrusted. In order to enable the various counties to make their offers for securing a normal school available, the board of regents was authorized to receive offers and pass upon them, to select from among them the one most favorable for the purpose intended, inspect the buildings and assess their value, * * * and, when accepted, the property was to be conveyed to the board of regents, who were to hold the same in trust for the purpose intended. The law further provides that all offers of buildings and grounds, suitable for the schools contemplated by the act, shall be forwarded to the state superintendent of public schools, for the consideration of the board of education; and when any bid or bids shall have been made proper for the consideration of the board of regents, the board of education shall call a meeting of the board of regents, who shall consider all offers and bids made, and proceed to secure the accepted offer, buildings and grounds, by proper deed, and establish therein a normal school for the district in which the county that made the offer is located. The act further appropriates five thousand dollars annually for the payment of teachers'

 Briggs v. Johnson County.

salaries of each school to be established, and requires the board of regents to make annual reports to the state superintendent of public schools, containing a full account of the acts of the board, of all receipts and disbursements, and the condition of said state normal schools; and such report shall be transmitted to the legislature by said superintendent as a part of his annual report. The provisions of the law quoted are those to which constitutional objections are raised, and such as are necessary for a proper understanding of the act and its purposes. The declaration is in the usual form upon the coupons due and unpaid, setting out a copy of the bond in full, which is as follows:

"United States of America.

"State of Missouri.

Johnson County.

"No. 42. }	Interest, ten per cent per annum, payable semi-annually.	{ \$1,000
------------	---	-----------

"Know all men by these presents: That the county of Johnson, in the state of Missouri, acknowledges itself indebted and firmly bound unto the bearer in the sum of one thousand dollars; which sum the said county of Johnson, for value received, hereby promises to pay to the bearer, at the Bank of America, in the city and state of New York, twenty years after date hereof, with interest thereon from this date at the rate of ten per centum per annum, payable semi-annually, on the first days of August and February in each year, on the presentation and delivery at said Bank of America of the coupons of interest hereto attached. This bond is issued pursuant to an order of the county court of said county of Johnson, to pay the subscription of one hundred thousand dollars to the normal school of the district in which said county is located, determined upon by a vote of more than two-thirds of the qualified voters of said county of Johnson, and in pursuance of an act of the general assembly of the state of Missouri, entitled 'An act to aid in the establishment of normal schools,' approved March 19th, 1870. In testimony whereof, the said county of Johnson has executed this bond."

The coupons are in the usual form.

Briggs v. Johnson County.

To this declaration a demurrer is filed, assigning for causes that the normal school act, under which the bonds were issued, is unconstitutional and void, and the bonds issued thereunder are invalid.

Thomas K. Skinker, for the plaintiff.

Thomas C. Reynolds, and *Crandall & Sinnett*, for the defendants.

KREKEL, J.—The grounds of demurrer, and arguments in support thereof, may be considered under the following heads: public policy; unconstitutional grant of the taxing power; special legislation.

As to public policy: It has long been a recognized fact that the order and well-being of any community largely depended on its moral and intellectual culture; and nearly all nations making any pretensions to civilization have in some way or other recognized this. The encouragement usually was in keeping with the prevailing form of government and social organization. As these became modified, so as to distribute burdens and benefits more equally, educational interest came in for a share of its favors. Not, however, until intelligence had demonstrated its physical power beyond cavil and dispute, did education obtain the universal recognition it deserves. Organizing armies and schools, improving implements of war, and the school-master, became equally of national concern. At the birth of our government, education had not obtained national recognition; for, beyond "the promotion of science and arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," no attempt is made in the constitution of the United States to draw education within national cognizance—thus indirectly delegating it to the states. In them it found more or less favor, until to-day there is not a state in the Union which fails to recognize its importance. The constitution of the state of Missouri, under which the normal school act was passed, in its ninth article provides: "A general diffusion of

Briggs v. Johnson County.

knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free schools for the gratuitous instruction of all persons in the state between the ages of five and twenty-one years." While the policy of the state regarding education is thus represented, it is argued that the constitution confines legislation to the establishment and maintenance of free schools and a state university—the latter provided for in section 4 of the article cited. It is true that, under this last section and the language thereof, "the general assembly shall also establish and maintain a state university, with departments for instruction in teaching, in agriculture, and in natural science." Normal schools might have been established; and had provisions similar in import been found in the constitution of the United States, and called for construction, a serious question might have arisen on account of its limited character and the necessity of an affirmative grant. In state constitutions, coming as they do from the people, in whom all political power resides, we look, on the contrary, for provisions denying to the legislature powers not to be exercised; for, without such a denial, the exercise of legislative functions is said to be unlimited, and the discretion of the legislature untrammelled. For courts to declare an act unconstitutional, because, in their opinion, the object had in view might have been accomplished in a different way, would be to substitute the dictum of a judge for the discretion of the legislature.

Another argument is that, while free schools and the state university are mentioned in the constitution, nothing is said of normal schools, and that the ignoring of them is equal to a constitutional prohibition. It has already been pointed out that such a construction is not favored, when applied to state constitutions. Supposing the constitution, after declaring that the diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people, had stopped—would not the establishment of any kind of a school calculated to diffuse knowledge and intelligence have been within the power of the legislature? In order to secure such schools as were undoubt-

Briggs v. Johnson County.

edly deemed the most essential, the constitution commands them to be established and maintained.

The constitution having vested all legislative power not prohibited by the constitution of the United States in the general assembly, the establishing of normal or other schools than those named, it is fair to presume, was intended to be left with the legislature. That normal schools are public institutions, useful and necessary for the full development of free schools, is not disputed.

The conclusions, from the views entertained and indicated, are, that the normal school act is in keeping with public policy, and the policy of the state of Missouri, and the passing of it a legitimate exercise of power under the injunctions of the constitution, and an act of discretion on the part of the legislature, which this court claims no right to control or criticise.

Coming to the consideration of the second ground of demurrer and arguments—the unconstitutional grant of the taxing power—it may well be introduced by a quotation from the case of the *Loan Association v. Topeka*, 20 Wall. 655. Mr. Justice MILLER, speaking for the court, says: “It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislature of the states, unless restricted by some special provision of their constitutions, may confer upon municipal bodies the right to take stock and lend their credit to corporations, and levy taxes on the inhabitants and on property within their limits, subject to general taxation, to pay the debts thus incurred. In all cases, however, the discussions turned upon the question whether the taxation was for public purposes, and this has been the turning point of the judgment of the courts. In no case have debts created by counties or towns been held valid, except on the ground that the purpose for which the taxes were levied was a public use—a purpose or object which it was the right and the duty of state governments to assist by money raised from the people by taxation.”

It has already been shown that normal schools are public institutions, and, as such, the legislature had a right to establish and

Briggs v. Johnson County.

maintain them. If this be so under the views of the supreme court of the United States, as expressed by Mr. Justice MILLER, the legislature had the right to grant the power of taxation in aid of their establishment. It is said, however, that the normal school act violates the principle of equal taxation in this, that Johnson county is made to contribute a larger share in support of the normal school than other property of the state. This argument, if valid, would be available against all classes of aid given to public objects; for the benefits of scarcely any of them operate equally, even on the small scale of a county. Take the case of a railroad, for instance: its benefits are greatest when reasonably near, and specially in the proximity of a station. Johnson county was invited, under the normal school act, to enter into competition; and, no doubt, the voters favoring the subscription did so—not so much on account of the general, as the local benefit to be derived from the school. In addition to the special benefit secured, they enjoy equally with the people of the state the general benefits of the school. Section 16 of the declaration of rights, even if not limited to the question of eminent domain, providing that “no private property ought to be taken or applied to public use without just compensation,” has been fully met. The property of the people of Johnson county was voluntarily contributed, after fully considering the question of compensation, at an election at which more than two-thirds voted for the appropriation.

The remaining question to be considered is, does the normal school act fall within the constitutional prohibition regarding special legislation?

The twenty-seventh section of article IV., after enumerating a large class of cases, and prohibiting the legislature from passing special laws regarding them, concludes by providing: “The general assembly shall pass no special law for any case for which provision can be made by general law; but shall pass general laws, providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable.”

Briggs v. Johnson County.

The large discretion left to the legislature in these provisions is obvious. The inhibition in the first part of the quotation is the passing of special laws in any case for which provision by general law can be made. The command in the last part of the clause cited, is that general laws shall be passed in all other cases where they can be made applicable. The legislature is entrusted with the determination for what cases provisions by general laws can be made; so, also, to what cases general laws can be made applicable. Under such provisions, a court would hesitate long before declaring an act passed unconstitutional.

Looking at the object to be effected, it would appear that the normal school act partakes more of the nature of a general law than a special act. It is the application of a law to a particular person or persons, or special facts and circumstances, which gives it character, either as a general or special act. This becomes obvious from an examination of the cases specified in the clause regarding which no special laws are to be passed.

It is further argued that, because the body of regents who are to control the schools is neither a corporation, company, or association, nor a department of the state university, nor a free school, as enumerated in the constitution, normal schools have no legal existence, and the legislature no power to authorize or permit a county to subscribe thereto, and the bonds issued are therefore void.

The question as to limiting by implication the legislative power under a state constitution has been considered. The legislature, being free to act, possesses the power of choosing the instrumentalities deemed best, and of creating such as may be found necessary.

The normal school is the legitimate offspring of the school law, aims at the very object it seeks to accomplish, and is but a link in the educational system of the state.

The labored briefs in the case have been a great aid in the examination. The arguments and authorities cited have been carefully considered. The conclusion arrived at is, that the demurrer is not well taken, and, therefore, it is overruled. The conclu-

Bonham v. Board of Education.

sions reached make it unnecessary to determine the question of former adjudication raised by the pleadings.

DILLON, J., concurs.

JUDGMENT ACCORDINGLY.

BONHAM v. BOARD OF EDUCATION OF HARRISONVILLE.

Bonds issued under the act of the legislature of Missouri of March 21, 1870, for building school houses, and reciting that act as the authority for their issue, are *prima facie* valid; and the holder may sue thereon, and is not confined to the special remedy prescribed in the act.

(Before DILLON and KREKEL, JJ.)

*School House Bonds.—Missouri Act of March 21, 1870.—
Liability to Suit.*

ACTION on coupons belonging to school bonds issued by the defendant under the act of March 21, 1870, referred to in the opinion of the court. The petition is in the usual form, and sets forth in full a copy of the bonds. The bonds are signed by the corporate officers of the defendant, and are under its corporate seal. The defendant demurred to the petition. The grounds of the demurrer are stated in the opinion.

Mr. Cravens, for the plaintiff.

Mr. Sloan and *Mr. Flanagan*, for the defendant.

KREKEL, J.—Under an act of the legislature of Missouri, entitled "Schools, cities, towns, and villages," approved March 21, 1870, cities, towns, and villages in Missouri were authorized to organize themselves as single school districts upon a majority voting in favor of such organization, upon which they could elect a board of education, which, under the twelfth section of the law, was "authorized, for the purpose of building school

houses only, to borrow money on the credit of the city, town, village, or district, and to issue bonds therefor, bearing interest not exceeding ten per cent per annum, which bonds shall not be sold or disposed of at less than ninety cents on the dollar." In case of failure to pay interest or principal of any such bond, the holder, after notice, can go before a county court and show the fact, whereupon the county court is required to notify the board of education, and if they fail to pay after such notice, the county court is authorized to add to the tax list a sum sufficient to pay the amount due.

The complaint or declaration in this case alleges that, under this act, on the 1st day of September, 1871, the board of education of Harrisonville issued certain bonds, on the coupons whereof this action is instituted. A copy of one of these bonds, made part of the petition, shows that the board of education of Harrisonville, Missouri, promises to pay to bearer the sum of fifteen hundred dollars, with interest at the rate of ten per cent, and recites that the bond is issued for the purpose of building a school house only, and refers to the act above cited as the authority for the issue of the bond.

To this declaration a demurrer is filed, assigning for cause that said defendant was never organized in conformity to the act cited, and is therefore no corporation. The answer to this must be that the defendant, in issuing the bonds signed by its officers and sealed by its corporate seal, exercised the usual function of a corporation. Its corporate existence cannot be questioned—at least by itself—in a suit brought upon evidence of debt given by it. (*Board of County Commissioners of Douglass County v. Bolles & Bolles*, decided at the October term, 1876, of the supreme court of the United States—4 Otto, 104). This disposes all of the causes of demurrer, except the fifth and sixth, which set up that plaintiff was bound to exhaust his remedy given by the act, namely: notify the county court of the failure to pay and await the results of their acts. It is evident from the act, that the legislature, by providing an easy and direct remedy for collection, sought to give value and currency to the bonds—

Rogers Locomotive Works v. Lewis.

but did not intend to deprive the holder of the usual legal remedies. (*Jordan v. Cass County*, 3 Dillon, 185.)

With a judgment establishing the validity of the bonds he may feel better armed to meet objections, such as are here raised, when he comes before the county court for the purpose of availing himself of the cumulative remedy that the law under which the bonds issued has given him. The demurrer is overruled.

DILLON, J., concurs.

JUDGMENT FOR PLAINTIFF.

ROGERS LOCOMOTIVE WORKS v. LEWIS *et al.*

1. Conditional sales of personal property are valid in Missouri.
2. Instruments evidencing a conditional sale of chattels need not be recorded in Missouri in order to be valid against creditors or subsequent purchasers—the registry law of Missouri only extending to mortgages or deeds of trust of chattels. The instrument in judgment held to be a sale on condition, and not a mortgage within the registry laws of Missouri.

(Before DILLON, Circuit Judge.)

Conditional Sale.—Mortgage.—Registry Act.

REPLEVIN for one locomotive engine, called the James W. Lewis, No. 1, and tender. The plaintiff delivered the engine and tender to the Keokuk and Kansas City Railroad Company, and received, as evidence of the contract under which they were delivered, the following instrument:

“The Keokuk and Kansas City Railroad Company has received from the Rogers Locomotive and Machine Works, at Paterson, New Jersey, one locomotive engine, James W. Lewis, No. 1, and tender, upon the following *conditions*:

“1. If the said railway company shall fully pay the following described promissory notes when they respectively become due and payable, viz.: One dated October 25th, 1873, at four months,

Rogers Locomotive Works v. Lewis.

payable to the order of said railway company at the National Bank of Commerce, in the city of New York, for five thousand six hundred and thirty-one 53-100 dollars (\$5,631 53-100), due February 25th, 1874, and one, same date, at six months, payable as above, for five thousand six hundred and ninety-five 70-100 dollars (\$5,695 70-100), due April 15th, 1874 — then and in such case it is agreed that the said engine and tender shall become and be thereafter the property of said railway company, but, in the meantime, and until such payment is made, the said Rogers Locomotive and Machine Works retains the title and ownership thereof.

"2. In case of default in the payment at maturity of said notes, or either of them, the said Rogers Locomotive and Machine Works may, without impairing the validity and effect of said notes, according to their tenor, resume the possession of said engine and tender, and the said company hereby agrees to surrender, return, and deliver up the same, in good order and condition, to the Rogers Locomotive and Machine Works, who may thereafter, if they see fit, sell said engine and tender at public auction, on not less than ten days notice (either party being at liberty to become the purchaser at such sale), and apply the proceeds, *pro tanto*, to the payment of such of said notes as shall then remain unpaid, rendering the overplus, if any, after discharging all costs and expenses of sale, to the said company, whose liability, in case of deficiency, shall still continue.

"Dated this the 25th October, 1873. In testimony whereof, the president of said company, under due authority, has caused the seal of said company to be hereto attached, and has signed his name hereto officially, the day and year last above written.

[Signed.] *The Keokuk and Kansas City Railway Company,*

"By S. H. MELVIN, President.

"ALBERT BLAIR, Secretary."

This instrument was never recorded. The engine has not been paid for—the only payment made thereon being \$180. The railway company became insolvent, and a judgment was rendered

Rogers Locomotive Works v. Lewis.

against it in one of the state courts, in November, 1875, which was declared a lien upon the "road bed, station houses, depots, bridges, rolling stock, real estate," etc., under the act of Missouri of March 21st, 1873. Upon this judgment execution issued, and the engine in question sold thereunder as personal property; and this is the title claimed by the defendants.

The purchaser, after the levy and before the sale under execution, had notice of the aforesaid instrument of October 25th, 1873, and of the plaintiff's claim thereunder.

G. S. Van Wagoner, for the plaintiff.

White, Clarke, & Shackelford, for the defendants.

DILLON, *Circuit Judge*.—On the argument the counsel agreed that the controlling question was, whether the instrument of writing dated October 25th, 1873, was a conditional sale or a mortgage. If the former, then the plaintiff, it was conceded, must succeed, since in that event the laws of Missouri did not require the instrument to be recorded. If the latter, then the plaintiff, it was admitted, must fail, because the instrument was not recorded, as required by the laws of Missouri in respect of mortgages of chattels.

The statute in this regard is as follows: "No mortgage or deed of trust of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or *cestui que trust*, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county," etc. (1 Wag. Stats. p. 281, sec. 8; *Bevans v. Bolton*, 31 Mo. 437.)

The rights of the plaintiff are the same, under the facts in this case, whether the transaction as set forth in the above mentioned instrument be regarded as a sale on condition of subsequent payment, the title meanwhile remaining in the plaintiff, or an executory agreement to sell, the title to vest when payment should be made, but not before. The courts have settled the doctrine

Rogers Locomotive Works v. Lewis.

that the seller and buyer may agree that the passing of the title to the property, although the property itself be actually delivered to the buyer, shall depend upon the buyer fulfilling some condition, precedent or concurrent, and that one of these conditions may be payment of the stipulated price. (Benjamin on Sales, sec. 320, and American cases cited in note; 2 Schouler on Personal Property, 292, 296, 293, and cases there referred to; 2 Kent's Com. 497.) And such is the law in the state of Missouri, as repeatedly declared by the decisions of its supreme court. (*Parmlee v. Catherwood*, 36 Mo. 479; *Griffin v. Pugh*, 44 Mo. 326; *Little v. Page*, 44 Mo. 412.) These cases, where there is no laches in the seller, apply the rule in his favor against even a purchaser from the buyer in good faith, without notice.

It being competent, then, to the parties to make such contracts, they ought, when made, to be construed so as to carry out, and not to thwart, their intention and purpose. What was the intention and purpose in this case? Was the instrument an agreement to sell on condition, or was it a complete and absolute sale and a mortgage for the price? There is nothing in the language or in the frame of the instrument to support the latter alternative. It is not stated that the engine has been "sold" to the railway company, but only that it has "received" it. It is stated that upon payment, "then and in such case the engine shall become and be thereafter the property of the said railway company, but in the meantime, and until such payment is made, the said Rogers Locomotive and Machine Works retains the title and ownership thereof." On default of payment the seller may "resume" possession, which the railway company agrees to surrender, with an election in the seller, if it sees fit to exercise it, to sell the property and apply the proceeds in payment of the price, and account for any surplus.

It may be that the registry laws, if wisely framed, ought to extend to such a case as this, and to require the seller to place the evidence of his rights on record, and accordingly we find that some of the states have recently passed enactments of the character suggested. But there is no such legislative requirement in

 Thistle v. Hamilton.

Missouri. This instrument was not a mortgage or deed of trust within the statute above quoted. It is our judgment that, under the instrument in question, the property never vested in the railway company; that the title has always remained with the plaintiff, and if so, then of course the instrument was not a mortgage within the meaning of the recording act, requiring registration.

The same conclusion has been reached by the circuit court of the United States for the district of Indiana, in the case of the *Rogers Locomotive Works v. Indianapolis, Bloomington, and Western Railway Company*.

JUDGMENT FOR PLAINTIFF.

NOTE.—In view of a recent decision of the United States supreme court in a case from Illinois, the court expressed a wish to have this judgment taken to the supreme court.

MARY H. THISTLE, Administratrix, v. H. B. HAMILTON, Assignee in Bankruptcy of the Lexington and St. Louis Railroad Company.

1. A creditor, whose claim is rejected by the bankruptcy court, and who duly takes an appeal to the circuit court, and there files a declaration to which the assignee has pleaded, has the right to have the issues of fact thus presented tried by a jury. (Rev. Stats. secs. 4980, 4984.)
2. The right to a jury trial may be waived in such a case, and such waiver need not necessarily be by written stipulation.
3. Under the circumstances, the right to a jury trial was held not to have been waived by the creditor, where the appeal was inadvertently submitted and decided as if the cause had been brought to the circuit court by a writ of error.

(Before DILLON, Circuit Judge.)

*Bankruptcy Appeal.—Revised Statutes, Secs. 4980, 4984.—
Right to Jury Trial.—Waiver of Right.*

THE plaintiff presented in the district court a claim for a large number of ties sold and delivered to the bankrupt. The claim

Thistle v. Hamilton.

was opposed by the assignee, and a jury trial was had in the district court, and a verdict returned for the defendant, on which judgment was rendered. The plaintiff perfected an appeal to the circuit court, as required by the bankrupt act (sec. 8 of original act, Rev. Stats. secs. 4980, 4984, Rule 26, General Orders in Bankruptcy). In the circuit court the claimant filed her statement or declaration, as required by section 4984 of the Revised Statutes, and the assignee filed an answer in denial. The case was entered on the appeal docket, and was submitted to the court, nothing being said about a jury by either party. The record sent up from the district court contained a bill of exceptions, embodying all the evidence and exceptions to portions of the charge of the district court to the jury, and to certain rulings in respect of testimony. In the arguments before the circuit court, the appellant relied chiefly upon the alleged erroneous rulings of the district court in matters of law, and these rulings not being considered by the circuit court to be erroneous, that court, at the November term, 1876, ordered the judgment below to be affirmed.

A motion was made, during the same term, by the appellant, to set aside this order of affirmance, and to proceed with the trial of the case in accordance with section 4984 of the Revised Statutes. It is this motion which is now before the court for decision.

N. C. Kouns, for the motion.

H. B. Hamilton, *contra*.

DILLON, Circuit Judge.—The claimant presented her claim in the district court, and made proof thereof, as required by section 5076 of the Revised Statutes. The assignee filed objections, and the claim was certified by the register to the district court, which granted the demand of the claimant for a trial by jury. This trial resulted in a verdict for the assignee, on which judgment was rendered, and the claimant appealed to this court in due time and form, and filed the statement or declaration

Thistle v. Hamilton.

required by section 4984, to which the assignee pleaded, denying the claim. Notwithstanding the district court granted a jury trial, the appeal was really from the decision of that court rejecting the claim; and, on the appeal being taken and perfected, the claimant was entitled to have the cause determined, as provided in section 4984. This section enacts that, upon entering the appeal in the circuit court, the creditor shall file "a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in action at law, commenced and prosecuted in the usual manner, in the courts of the United States," etc. The appellant having filed her declaration, and the assignee having answered, issues of fact were thus presented which either party had the right to have determined by a jury. The proceedings in the district court may be summary, without a jury, and the claim rejected as not being duly proved, or as being founded in fraud, illegality, or mistake. (Rev. Stats. sec. 5081; *Catlin v. Foster*, 1 Sawyer, 46.) An appeal is allowed, which, in such cases, is really converted into an action at law in the circuit court, and is to be tried like actions at law commenced originally in that court. (Rev. Stats. secs. 4980, 4984, Rule 26, General Orders in Bankruptcy.) I agree with the late Judge WOODRUFF, that "these sections contemplate not a mere review of the adjudication in the district court, but the trial of the questions of fact by a jury upon pleadings and an issue, or an issue of law, if there shall be a demurrer." (*In re Place*, 8 Blatchf. 302; *in re Jaycox*, 12 Blatchf. 209; *Catlin v. Foster*, 1 Sawyer, 46.) Undoubtedly the parties can waive the right of a trial by jury in such a case, the same as in cases at law commenced in the circuit court by original process; and such waiver need not necessarily be by written stipulation. (*Kearney v. Case*, 12 Wall. 275.) If the parties in the present appeal had said, "We submit the case to the court upon the testimony which is embodied in the bill of exceptions," and the circuit court had examined this testimony

Walker v. Towner.

and found that the claim was not sustained, we should have refused a motion afterwards for a trial by jury. But no such agreement was made, and no such course taken. It was inadvertently submitted and decided as if the case had been brought into the circuit court by a writ of error. The evidence is conflicting; there was no intention on the part of the appellants' counsel to waive a jury trial; and, under the circumstances, it would be applying too strict a rule to hold that what was done precludes the creditor from having the issues of fact tried in the usual manner. The order of affirmance will be set aside, and the cause will stand for trial by a jury.

MOTION GRANTED.

NOTE.—The point stated in the first head-note, in relation to the right of a trial by jury, was ruled the same way by Mr. Justice MILLER, in *Manning v. Simpson, assignee*, in the circuit court for the eastern district of Missouri, September term, 1877.

WALKER, Assignee, etc., v. TOWNER.

1. A suit by an assignee in bankruptcy to collect debts or claims due to the estate, must be brought within two years from the time when the cause of action accrued to the assignee.
2. Where an assignee filed his petition or declaration in a suit to recover such a debt within two years from the time when his right of action accrued, but gave directions to the clerk not to issue the summons, and such summons was accordingly not issued or served until more than two years from the time the cause of action accrued: *Held*, that the action was barred.

(Before DILLON, Circuit Judge.)

Bankrupt Act.—Revised Statutes, Sec. 5057.—Limitation of Actions.

THIS is an action brought to recover \$3,500, as the balance due by defendant upon a subscription by him to the capital stock of the North Missouri Insurance Company, of which the

Walker v. Towner.

plaintiff is the assignee in bankruptcy. The petition in this case was filed March 20, 1876; but the summons was not issued (by direction of the plaintiff's attorney, as stated in the plea of the statute of limitations below mentioned) until November 1, 1876, and was not served until November 2, 1876. The petition alleges that the company was adjudicated a bankrupt November 8, 1873; that the plaintiff was appointed assignee on March 21, 1874, and that on July 3, 1874, the district court, on a petition presented by the assignee, found "that it is necessary, for the purpose of paying the indebtedness of the said company, to collect the whole of its assets, including the unpaid stock," and thereupon "ordered that the said assignee *proceed forthwith* to collect from the stockholders of said company the full amount due and unpaid on the shares of stock by them respectively held in said company."

The defendant answered. The second and third special defences set up the statute of *limitations* prescribed in the bankrupt act. It is alleged in said defences that the deed of assignment from the register in bankruptcy to the plaintiff, as assignee, was dated March 23, 1874; that the order of the bankruptcy court assessing all stockholders, etc., was made July 3, 1874; that plaintiff's petition in this action was filed herein March 20, 1876; the writ issued November 1, 1876, and service had on defendant November 2, 1876. It is also alleged that service of process was countermanded by plaintiff for an indefinite time, and that plaintiff, of his own accord, and without the fault of defendant, forbore to issue process or to prosecute said suit until said issue of process, November 1, 1876.

To this plea of the statute of limitations the plaintiff demurred, and it was on this demurrer that the case was submitted to the court.

Mr. N. Myers, for the plaintiff.

Mr. Albert Blair, for the defendant.

Walker v. Towner.

DILLON, *Circuit Judge*. — The plaintiff's petition to recover in this case was filed within two years from the date of the order of the district court to the assignee to collect the unpaid stock, but, by direction of the plaintiff's counsel to the clerk, the writ of summons was not issued until more than two years from the date of that order had elapsed. The effect of this is conceded to be the same as if the petition had not been filed until November 1, 1876, which is more than two years from the time when the assessment or order to collect by the bankruptcy court was made. If, under the second section of the bankrupt act as found in the Revised Statutes, section 5057, any suit for the collection of assets by an assignee in bankruptcy is barred by the two years limitation therein prescribed, then the present action is barred, if the facts set forth in the plea are true.

This is an important question, and it has been thoroughly argued by counsel. Since this case was submitted, the same question came before Mr. Justice MILLER, in the Kansas circuit, at the June term, 1877, in the case of *Payson, assignee, etc. v. Coffin, post*.

The learned justice, after argument and consideration, there held that the two years limitation in the bankrupt act applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property. The opinion was orally pronounced, but this conclusion was regarded as the almost necessary result of the language of section 2 of the bankrupt act of 1867, particularly the words "but *no suit* at law or in equity shall *in any case* be maintainable by or against such assignee, * * * unless the same be brought within two years from the time the cause of action accrued for or against such assignee," which was not intended to be changed, in substance, by the Revised Statutes, sections 4979, 5057; and this conclusion was considered to be strongly supported by the views of the supreme court in *Lathrop v. Drake*, 1 Otto, 566; *Clafin v. Houseman*, 3 Otto, 130, and *Bailey v. Glover*, 21 Wall. 342, and by the obvious policy of the bankrupt act in requiring speedy settlement of estates in bankruptcy. In *Bailey v. Glover, supra*,

Walker v. Towner.

Mr. Justice MILLER, *arguendo*, observed: "To prevent this [protracted litigation and delays in closing the estate] as much as possible, congress has said to the assignee, 'You shall commence *no* suit two years after the cause of action has accrued to you, nor shall you be harrassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be settled up, and your functions discharged, and we close the door to *all litigation* not commenced before it has elapsed.'"

The decision in *Payson, assignee, v. Coffin, supra*, has authoritative force in this circuit, and it is needless to enforce the arguments by which it may be sustained as a sound exposition of the limitation provisions of the bankrupt act. It is true that views have been expressed by judges which might lead to a different conclusion, as in *Sedgwick v. Casey*, 4 Bank. Reg. 496; *Smith v. Crawford*, 9 *Ib.* 38; *re Krogman*, 5 *Ib.* 116; *Bachman v. Packard*, 7 *Ib.* 353; *Stevens v. Hauser*, 39 N. Y. 302; *Union Canal Co. v. Woodside*, 11 Pa. St. 176; *re Conant*, 5 Blatchf. 54; but the weight of judicial opinion is with the judgment of Mr. Justice MILLER, in *Payson, assignee, v. Coffin*. (*Mitchell v. Great Works Milling Co.* 2 Story, 648, 660; *Pritchard v. Chandler*, 2 Curtis, 488; *McLean v. Lafayette Bank*, 3 McLean, 185, 188; *Norton v. De la Villebeuve*, 1 Woods, 168; *Miltenberger v. Phillips*, 2 Woods, 115; *Comegys v. McCord*, 11 Ala. 932; *Harris v. Collins & Cartwright*, 13 Ala. 388; *Paulding v. Lee*, 20 Ala. 753; *Pike v. Lowell*, 32 Me. 245; *Archer v. Duvall*, 1 Fla. 219; *Lathrop v. Drake*, 1 Otto, 566; *Claflin v. Houseman*, 3 Otto, 130; *Bailey v. Glover*, 21 Wall. 342.)

Whether any cause of action accrued prior to the order of July 3, 1874, it is not necessary to determine. Judgment will be entered overruling the demurrer to the plea of the statute of limitations.

JUDGMENT ACCORDINGLY.

Ex parte Peters.

Ex parte F. W. PETERS.

1. The petitioner for the writ of *habeas corpus* entered a general plea of guilty, in the district court, to an indictment containing four counts, and setting forth at least two distinct offences of a similar character, and was sentenced to two years imprisonment upon each count, each term commencing at the expiration of the preceding term; after two years, but before the expiration of four years, he applied to be discharged on *habeas corpus*, on the ground that the court had no authority to render cumulative judgments: *Held*, that the judgment of the court, when collaterally assailed, was not wholly void, and was good to the extent of four years imprisonment at least.
2. Section 1024 of the Revised Statutes construed and applied.

(Before DILLON and KREKEL, JJ.)

*Habeas Corpus. — Revised Statutes, Sec. 1024, Construed. —
Cumulative Judgments.*

THIS is a petition by F. W. Peters for a writ of *habeas corpus*. The indictment on which petitioner was convicted in the district court of the United States, contains four counts.

The first count charges that Peters, on the 28th day of October, 1874, did forcibly break into the post-office at Bucklin, Linn county, Missouri, with the intent to commit larceny therein.

The second count charges that the defendant, Peters, on the same day, did steal a certain letter, containing \$750, out of the same post-office.

The third count charges that Peters, on the 12th day of November, 1874, did forcibly break into the post-office and the building used in part as the post-office at Unionville, Putnam county, Missouri, with the intent to commit a larceny therein.

The fourth count charges the stealing, at the same place, and on the same day, and out of the last mentioned post-office, by defendant Peters, of two letters, containing \$157 in money.

The defendant pleaded guilty, and was sentenced as shown by the return to the writ of *habeas corpus*, which return is as follows:

Ex parte Peters.

"Now, at this day, comes the warden of the penitentiary of the state of Missouri, and makes return of the writ of *habeas corpus* issued by order of this court upon the application of said F. W. Peters therefor, and states and certifies to this honorable court, that said F. W. Peters is now held and detained within said penitentiary, and under the custody of the undersigned as the warden thereof, under and by virtue of a commitment issued out of the district court of the United States for the western district of Missouri, in pursuance of the conviction and sentence of said Peters by said court, which said commitment is as follows:

"UNITED STATES OF AMERICA, }
 WESTERN DISTRICT OF MISSOURI. }

"*In the District Court of the United States for the Western District of Missouri:*

"Be it remembered: That, at a regular term of the district court of the United States for the western district of Missouri, begun and holden in the city of Jefferson, in said district, on the first Monday, the 1st day of March, A. D. 1875, and on Monday, March 8th, the following proceedings were had:

"MONDAY, March 8th, 1875.

"THE UNITED STATES v. F. W. PETERS, *alias* JOHN G. CRAWFORD.

"*Indictment for Breaking into Post-office, and Stealing Letters therefrom.*

"On this day comes the district attorney, on behalf of the United States; and also comes the defendant, F. W. Peters, *alias* John G. Crawford, in his own proper person, and by his attorney, N. C. Kouns, and, with leave of court, withdrew his plea of not guilty, heretofore recorded herein, and for plea says he is guilty as charged in the indictment preferred against him; and it being forthwith demanded of the defendant if he has anything further to say why the court here should not proceed to pronounce judgment against him, says he has nothing further to say than he hath said. And thereupon, all and singular the premises being seen and fully understood, it is adjudged that the said F. W. Peters, *alias* John G. Crawford, be imprisoned and

Ex parte Peters.

confined to hard labor for the term of two years in the Missouri penitentiary, under each count, of four counts of the indictment; the first term to commence on the 8th of March, 1875; the second term to commence on the expiration of the first term of two years; the third term of two years to commence on the expiration of the second term of two years; and the fourth term of two years to commence on the expiration of the third term of two years; and said four terms to constitute a continuous imprisonment of eight years. And it is further adjudged that defendant pay a fine of one dollar.

"Whereupon the prisoner, F. W. Peters, *alias* John G. Crawford, is remanded into the custody of the marshal, who is commanded forthwith to deliver the said F. W. Peters, *alias* John G. Crawford, at the penitentiary of the state of Missouri, into the custody of the warden thereof, together with a copy of this judgment.

"In witness whereof, I have hereunto subscribed my name and affixed the seal of said court, at my office, in the city of Jefferson, in said district, this 8th day of March, A. D. 1875.

[Signed.]

"ALFRED S. KREKEL,

"*Clerk United States District Court,*

[SEAL.]

"*Western District of Missouri.*

"A true copy:

"GEORGE SMITH, *U. S. Marshal.*

"By S. O. TENNY, *Deputy.*

"He further states that said F. W. Peters, *alias* John G. Crawford, under and by virtue of said commitment, was delivered into the custody of the warden of said penitentiary by the United States marshal, on the 9th day of March, 1875, and that he has since that time been imprisoned and confined at hard labor in said penitentiary; and that his term of imprisonment, according to said commitment, and the judgment, and the sentence therein recited, will not expire until the 8th day of March, 1883.

"All of which I hereby certify.

"J. R. WILLIS,

"*Warden of the Missouri Penitentiary.*"

Ex parte Peters.

The facts set forth in the return of the warden were not contested.

Section 1024 of the Revised Statutes, referred to in the opinion, is as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

N. C. Kouns, for the petitioner, *Peters*.

A. W. Mullins, district attorney, and *M. T. C. Williams*, for the United States.

DILLON, Circuit Judge.—The case was submitted at the term, and as it involved an important question, time was taken to consider it.

I have given it considerable reflection, and have submitted the record and the arguments to Mr. Justice MILLER. He was strongly inclined to the opinion that the most favorable view to the petitioner is that at least two distinct offences were charged, one in the first and one in the third count; that after conviction, by force of section 1024 of the Revised Statutes, these two offences must be treated, *in this proceeding*, as having been "properly joined," the defendant having taken no exception to the joinder at or before the trial, but having pleaded guilty to the whole indictment, and that, as a consequence, the judgment of the court is good to the extent of four years imprisonment at least; and that since that period has not elapsed, the petitioner is not entitled to his discharge on *habeas corpus* at this time.

Without going into the learning as to the power to render cumulative judgments in criminal cases, either in felonies or misdemeanors, or whether the offences charged against the petitioner are felonies or misdemeanors, nor what is the effect, logical or legal, of section 1024 of the Revised Statutes upon the rule or

McCord v. McNeil.

doctrine of the common law in this behalf, I concur in the view which impressed Justice MILLER as the sound one, and which is above indicated; and I hold that the petitioner is not entitled to his discharge at this time. Whether he can successfully apply to be discharged on *habeas corpus* at the end of four years, we do not determine.

This case coming before us on *habeas corpus*, is distinguishable from the *United States v. Maguire* (Cent. Law Jour. April 28th, 1876, p. 273), and, besides, the whole question as to the power of the federal court to render cumulative judgments was in that case expressly left open for further consideration. In this collateral proceeding it must be taken, for the reasons above suggested, that at least two offences were properly joined; and that, although the judgment of the court may have been erroneous, it was not void. The petitioner must be remanded.

KREKEL, J., concurs.

ORDERED ACCORDINGLY.

NOTE.—See *ex parte Shaffenburg*, *post*; *ex parte Parks*, 93 U. S. R. 18.

JAMES McCORD *et al.* v. MARVIN B. McNEIL, Assignee, etc.

1. An attachment of the property of a debtor on mesne process is *ipso facto* dissolved by a deed of assignment made in bankruptcy if the proceedings in bankruptcy were commenced within four months after such attachment. (Rev. Stats. sec. 5044—sec. 14 of original act.)
2. In such a case the assignee's right is superior to the right of the attaching creditor, although the attached property had been sold before the commencement of the bankruptcy proceedings, and the proceeds paid over to the creditor after the adjudication, but prior to the date of the deed of assignment.
3. Such a sale of the attached property and payment of the proceeds to the creditor, do not distinguish the case in principle from *Bracken v. Johnston*, 4 Cent. Law Jour. 9, S. C. *post*.

(Before DILLON, Circuit Judge.)

McCord v. McNeil.

Bankruptcy.—Dissolution of Attachment in State Court by Bankruptcy Proceedings.—Revised Statutes, Sec. 5044, Construed.

ERROR to the district court of the United States for the western district of Missouri. This was a suit brought in the district court of the United States by McNeil, as assignee of Broughton & Co., bankrupts, against McCord, Nave, & Co., to recover certain moneys received by them from the sheriff of Clay county, Kansas, the same being the proceeds of the sale of certain personal property of Broughton & Co., which had been attached by McCord, Nave, & Co. (the plaintiffs in error), in a suit brought by them against Broughton & Co. in the district court of said Clay county, and which, pending the suit, had been sold by the sheriff under an order of said state court.

It is agreed that the facts are as follows :

1. On the 2d day of September, 1874, F. Delves Broughton and D. N. Fulton were copartners in trade as merchants, under the firm name of F. Delves Broughton & Co., at Clay Center, Kansas. They were indebted to the defendants, merchants at Kansas City, Missouri, under the firm name of McCord, Nave, & Co., in the sum of \$1,072.39 and interest, for merchandise. On the 2d day of September, 1874, the defendants instituted suit against Broughton & Co., on their demand, in the district court of Clay county, Kansas, caused an attachment to issue, and the property of Broughton & Co. to be seized under the attachment. In the month of September, the attaching creditors procured from the district court, under the provisions of the statutes of Kansas, an order for the sale of the property attached, and on the 6th day of October, under this order, the property was sold by the sheriff of Clay county for \$908. The summons in the civil action was personally served upon the defendants, Broughton and Fulton, on the day it was issued, September 2d, and was returnable September 12th. The defendants, Broughton and Fulton, wholly made default, and never answered.
2. On the 9th day of October, 1874, certain creditors of Broughton & Co., constituting the requisite number, filed in the

McCord v. McNeil.

district court of the United States for the district of Kansas a petition to have Broughton and Fulton declared bankrupts, and under this petition, on the 28th day of October, the adjudication of bankruptcy regularly passed.

3. On the 18th day of November, 1874, at the regular term of the district court for Clay county, final judgment in the civil action and on the attachment was rendered in favor of McCord, Nave, & Co., against Broughton & Co., for \$1,107.24, and an order made by the court to pay proceeds of attached property to the plaintiffs in the judgment. Under this order the sheriff, on December 15th, 1874, after deducting \$90 for costs, paid over to the judgment creditors, the defendants in this action, \$818.

4. On the 28th day of December, 1874, the plaintiff in this suit was appointed assignee in bankruptcy of Broughton & Co., and on same day the regular assignment was made by the register in charge; the plaintiff is the present and sole assignee in bankruptcy of Broughton & Co.

5. The proceeding by attachment was not collusive between McCord, Nave, & Co. and the bankrupts, nor was it in any way procured by the bankrupts.

6. The proceeding in bankruptcy was not suggested in the civil action, nor in the attachment proceedings. The assignee has never intervened in the district court of Clay county to claim the proceeds of the attached property. The petitioning creditors in the bankruptcy proceedings had knowledge of the civil action and proceeding by attachment, but made no suggestion of the bankruptcy proceedings to the court.

7. The defendants had actual notice of the pendency of the proceedings in bankruptcy a few days prior to the adjudication.

8. The plaintiff, on the 8th of February, 1875, demanded of defendants the payment of \$1,008.00, which defendants refused to pay.

On these facts the district court rendered judgment for the assignee for the sum of \$818 and interest from February 8, 1875, to reverse which the defendants prosecute this writ of error.

McCord v. McNeil.

John K. Oravens, for the plaintiffs in error.

Gage & Ladd, and *Karnes & Ess*, for the defendant in error (the assignee).

DILLON, *Circuit Judge*.—In the case of *Bracken v. Johnston*, *post*, S. C. 4 Cent. Law Jour. 9, it was decided by Mr. Justice MILLER that a creditor who proceeds in the state court by a writ of attachment on which he seizes the property of his debtor and collects the judgment obtained in such suit by a sale of the property attached, is liable to the assignee in bankruptcy of the debtor appointed under proceedings commenced in the bankruptcy court within four months of the levy of the attachment, although the assignee did not appear or defend the attachment suit or make any attempt to arrest the attachment proceedings.

The case just cited was deliberately considered, and it may not be improper to state, as illustrating the difficulty of the question involved, that the record in that case was informally laid before the judges of the supreme court, and that they were equally divided in opinion. I had decided the same principle in *Bradley v. Frost* (3 Dillon, 457). In the argument of the present case the learned counsel for the plaintiffs in error admitted that those cases were within section 5044 of the Revised Statutes, and decisive against him unless this case can be distinguished. He insists that this case can be distinguished from those on the ground that under section 5044 it is the deed of *assignment* which relates back to the commencement of the proceedings in bankruptcy, and which has the effect to dissolve any attachment of property on mesne process made within four months next preceding the commencement of the bankruptcy proceedings.

In this case the property attached had been sold pending the suit in the state court, three days before the petition in bankruptcy was filed, and the money, which was the proceeds of the attached property, was actually paid over to the creditor by order of the state court before the *assignment* was made, although the date of such payment was after the institution of the bankruptcy proceedings, and after the adjudication of bankruptcy had passed.

 White v. Insurance Company.

It is admitted by the counsel for the creditor that if the property attached had not been sold prior to the filing of the petition in bankruptcy, the case would fall within *Bracken v. Johnston*, and that the assignee in bankruptcy would be entitled to recover. But he claims that, having been sold before the commencement of the proceedings in bankruptcy, it was not "*then attached*" (sec. 5044), that is, was not under attachment at the time the bankruptcy proceedings were instituted, and that the order of the state court to pay the proceeds to the creditor on his judgment is valid and effectual as against the assignee. It is my opinion that this narrow distinction cannot be maintained. The proceeds of the attached property stand in the place of the property attached, and these proceeds, or the right to them, passed to the assignee by virtue of the assignment, which related back to the commencement of the proceedings in bankruptcy, at which last mentioned time the money was in the custody of the state court, the same as the property had been out of which the money arose.

I may add that I submitted to Mr. Justice MILLER the point here made by the counsel for the creditor, and that he was of opinion that no solid distinction in this respect could be found between the present case and that of *Bracken v. Johnston*.

AFFIRMED.

NOTE.—See *re Hazens*, *post*.

 WHITE v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

1. The act of the legislature of the state of Missouri of March 23d, 1874, in respect of policies of life insurance, extends to all policies delivered in this state after the act went into effect.
2. Where the provisions of that act are in conflict with the provisions of the policy, the act controls the policy.
3. Whether the applicant for insurance may waive the benefit of the act, *quære*; but no such waiver arises by implication.
4. The act extends to warranties as well as to representations.
5. The purpose and policy of the act expounded.

(*Before* DILLON and KREKEL, JJ.)

White v. Insurance Company.

Life Insurance.—Missouri Act as to Misrepresentations in Policies, Construed.

ACTION by the plaintiff, as administratrix of the estate of her late husband, John H. White, on a policy of insurance, dated October 2d, 1874, upon the life of the said White for the sum of \$10,000. The assured was a citizen of Missouri, and the policy was issued and delivered to him in this state. When it was so delivered the act of March 23d, 1874, was in force. This act is as follows:

"SECTION 1. No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable; and whether it so contributed in any case, shall be a question for the jury.

"SEC. 2. In suits brought upon life policies heretofore or hereafter issued, no defence based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court, for the benefit of the plaintiffs, the premiums hereafter received on such policies, with six per cent interest per annum from the date of receipt.

"SEC. 3. This act shall take effect and be in force from and after its passage."

The defendant company answers, setting forth that the policy contained a provision or condition, as follows: "That the answers, statements, representations, and declarations contained in or indorsed upon the application for this insurance—which application is hereby referred to and made a part of this contract—are warranted by the assured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be absolutely void." The answer further alleges that, in the application for the policy, the assured falsely answered that he had never had asthma; also falsely answered that he had never been addicted to

White v. Insurance Company.

the use of alcoholic beverages; also falsely answered that he had not been attended by a physician for a long time; also falsely answered that he had no usual medical attendant. These several answers of the assured, contained in the application, are alleged to be false; but the counts in the answer of the defendant demurred to, do not contain an allegation that the matters misrepresented contributed to the death of the assured, or that the said misrepresentations were fraudulently made, with a view to deceive or mislead the company.

The plaintiff demurs.

Clarke, Waters, & Winslow, for the plaintiff.

Lee & Adams, and *Botsford & Williams*, for the defendant.

DILLON, *Circuit Judge*. — The statute of March 23d, 1874, is silent as to what shall be the effect if the policy contains conditions in conflict with it. And the policy in suit contains no express reference to the statute, and no express waiver by the assured of its provisions. If the statute applies, the counts of the answer to which the demurrer relates are not sufficient, because there is no averment that the matters misrepresented were material. If the statute does not apply to this contract and control the rights of the plaintiff, the answer is sufficient without such an averment. We have, therefore, two leading questions presented:

1. Whether the statute controls the provisions of the policy, or whether the provisions of the policy inconsistent with those of the statute control the latter. If the statute controls the policy where the two are in conflict, then —

2. Whether the statute, by its true construction, embraces within its remedial provisions *warranties* as well as *representations*, as these are known to the law of insurance.

In *Chance v. Union Mutual Life Insurance Company*, the circuit court of the eastern district of Missouri (DILLON and TREAT, Judges), at the September term, 1876, ruled the following points under the enactment here in question:

White v. Insurance Company.

"1. A contract of life insurance made by a foreign company doing business in Missouri, and countersigned and delivered in this state by the local agents of the company to, and insuring, a citizen, inhabitant, or other person in the state, falls within the Missouri act of March 23d, 1874, if delivered after that act went into effect. As to such policies, the act is to be treated as incorporated therein.

"2. The act extends to all misrepresentations made in obtaining or securing the policy. Whether the act extends to *warranties*, this case does not require the court to decide.

"3. A defence based upon section 1 of that act must, in addition to alleging the misrepresentation, allege also that the matter misrepresented actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed is made by the act a question for the jury; hence it is necessary for the defendant to make the averment that the matter misrepresented contributed to the contingency or event insured against.

"4. It is not necessary to the sufficiency of an answer based upon section 1 of the act, that it be alleged that the premiums required to be deposited by section 2 have been actually deposited in court for the plaintiff. This may be done at any time 'at or before the trial.' If not done, the court can deal with the omission in a summary manner."

Subsequently, in *Lowell v. Alliance Life Insurance Company*, decided at the same term, Judge TREAT held that the statute extended to *warranties* the same as to representations (3 Cent. Law Jour. 609).

No opinions were written in those cases, and the counsel for the company in the case at bar present the questions anew in this court, whether the statute or the contract fixes the rights of the parties where the two are inconsistent, and whether the statute extends to *warranties*. These questions we proceed briefly to examine, in the order stated.

1. As bearing upon both of these inquiries, it is essential to ascertain the mischief which this remedial statute was designed

White v. Insurance Company.

to cure, in order that the statute may be construed, so far as its terms will permit, to suppress the mischief and advance the remedy.

Within the last twenty-five years life insurance has attained such a vast growth as to have important public relations. It has become a usual and favorite means for making provisions for the wife and children and creditors of the assured. Life insurance companies are in the nature of savings banks, in which are invested much of the surplus earnings of the people. Universally, the companies, in taking the policies, make it a practice to put a large number of questions to the applicant, touching a great variety of matters, some of which are material, but many of which bear remotely, if at all, upon the real risk assumed. In the policy here in suit, eighty-six questions are answered.

This practice, within proper limits, is not objectionable. But when the answers are obtained, the companies almost universally insert a condition in the policy to the effect that the application is made a part of the policy, and each of the answers a *warranty* on the part of the assured. The effect of this is that if any one answer, however immaterial to the risk, is not literally true, there can be no recovery, although the assured was honestly mistaken, and had paid his premiums for years, and the mistaken answer in no way related to the cause of the death of the assured. This was bad enough; but in more recent years many of the companies have proceeded further, and in effect have inserted provisions in their policies putting all statements or representations made in effecting an insurance on the footing of warranties, and the courts have felt constrained to uphold the contract as framed. Take, as conspicuous examples, the leading cases of *Anderson v. Fitzgerald*, 4 House of Lords Cases, 484, and *Jeffries v. Life Insurance Company*, 22 Wall. 47.

The policies in these cases contained a provision that if the statements in the application were not true, the policies should be void; and the policies were held void for the false statement of a fact, although it was not material to the risk, and although it was not in terms declared to be a warranty.

White v. Insurance Company.

The legislature of Missouri conceived, and we think wisely, that the promises held forth to the assured in the policies in general use were but too often a delusion and a snare, and as the courts were powerless to correct the evil, it ought to be corrected by statute. It is stated by counsel that the act of March 23d, 1874, was occasioned by the decision of the circuit court in Jeffries' case, above mentioned; and this is not improbable.

In the light of these considerations, the purpose and meaning of the statute are not to be mistaken. True, the statute is not framed with the utmost care, nor with nice precision in the use of language. If more caution had been taken, it would have contained a clause that all subsequent policies should be subject to its provisions, and also words in terms extending its operation to warranties. And if it had been dictated by a just regard for the rights of the companies, it would have excepted wilful and fraudulent representations from its operation, although it is probable that the courts may hold that such is its true construction.

We are of opinion that policies issued and delivered in Missouri after that act took effect fall within its protective operation; and as to such policies the act is to be treated as if incorporated therein, certainly, unless there is an express provision in the policy to the contrary, if it be competent, indeed, to insert such a provision. Our attention has been called to a late decision of the court of appeals of Kentucky, in which a conclusion is reached that seems to be in conflict with the view above expressed. (*Farmers, etc. Ins. Co. v. Curry*, 10 Ch. L. N. 43.) It is seldom that we feel constrained to differ with the deliberate judgment of that learned and able court, but in this instance we are not convinced by its reasoning. Its conclusion thwarts what appears to us the manifest purpose of the enactment. An exactly opposite conclusion was reached by the supreme court of New Hampshire, under precisely the same kind of an enactment. (*Chamberlain v. Ins. Co.* 55 N. H. 249, 264; Gen. Stats. N. H. ch. 157, p. 325; *Emery v. Piscataqua, etc. Ins. Co.* 52 Me. 322.)

It is by no means clear that a principle of public policy is not

White v. Insurance Company.

involved in such an enactment as that of the Missouri legislature here in question. If such a statute is founded upon public policy, even an express waiver of its benefits would be inoperative—as much so as if a borrower should expressly waive the statute against usury, although the statute is intended for his benefit. But, conceding that the statute is not so founded on public policy as that its benefits may not be renounced, still the general rule is that laws in existence are necessarily referred to in all contracts made under such laws, and that no contract can change the law. Such is the general rule. The exception is that where no principle of public policy is concerned, a party is at liberty to waive a statutable provision intended for his benefit. But the intention to waive such benefit ought to be clear. Now, to hold that a party, by merely accepting a policy in the form in use before the statute was adopted (which produced the very mischief aimed at by the legislature), waives the intended protection of the statute, is to defeat the precise end that the legislature had in view. It is to perpetuate the mischief and to nullify the remedy.

2. The second question, viz.: whether the statute of Missouri extends to warranties as well as representations, has given us more difficulty. It will be noticed that the statute does not use the word “representations,” but “misrepresentations,” and it extends to *all* such made in “obtaining or securing” the policy.

In view of the quite general provisions of policies to the effect that all declarations and statements, if untrue, shall avoid the policy, whether material or not (see *Anderson v. Fitzgerald*, *supra*; *Conover v. Mass. Ins. Co.* 3 Dillon, 217, and case cited; *Jeffries v. Ins. Co. supra*), and whether in terms declared warranties or not, we are of opinion that the evil which the legislature intended to remedy would not be met, if we should restrict the operation of the statute to representations, strictly so-called, as distinguished from warranties.

As between warranties and representations, where these were kept distinct, the mischief which was felt grew out of the principles applicable to the former rather than the latter. Indeed,

White v. Insurance Company.

it is the doctrine of warranties, or rather the practice of the companies in requiring such a large number and variety of questions to be answered, and then inserting a condition in the policy that all such answers are warranties, that wrought the most injustice. And we cannot readily suppose that the legislature, in laying the remedial ax to this matter, intended to strike at the comparatively harmless doctrine of representations proper, and to leave the tap-root of the mischief arising out of warranties untouched. They aimed at all statements which they called "misrepresentations made to obtain or secure a policy," and declared what should be the effect of these statements, whether the condition in the policy referring to them called them warranties or representations, or without calling them by either name, compendiously provided that they should, if not true, avoid the policy, whether material or not.

The demurrer to the first four counts in the answer is sustained; and leave given to amend.

KREKEL, J., concurs.

JUDGMENT ACCORDINGLY.

NOTE.—On the trial the circuit judge, with the concurrence of Judge KREKEL, made the following observations to the jury as to the purpose, scope, and meaning of the act of March 23d, 1874:

"The statute was intended to provide a remedy for what was frequently productive of injustice, arising out of the practice of the companies to put to the applicant for insurance a great variety and number of questions, some of which were material, and some of which very remotely bore upon the proposed risk, and then, by a sweeping provision or condition in the policy, declaring that if *any one* answer was untrue, it should avoid the policy, and the courts had held that such provisions were valid, and that in such case the policy was void, whether the answer which proved to be untrue was material to the risk or not, and whether such answer was intentionally untrue or was the result of an innocent mistake.

"But it still remains true, notwithstanding the statute, that the contract of insurance is eminently one which presupposes and requires good faith, honest representations, and fair conduct on the part of both parties, of the persons who obtain the insurance and the company which grants the insurance. For a comparatively small premium, the company agrees to pay on the contingency of death a large sum of money. This

Harris v. Babbitt.

feature of the business of insurance tempts to perpetration of frauds on the companies. It is to the interest of all that fraud should never succeed. It cannot, we think, be supposed that the legislature of Missouri, in the passage of the act of March 23d, 1874, intended to give any sanction or protection to fraudulent practises against the companies; but their intention was to extend protection, to the extent therein provided, against the usual conditions in insurance policies, and to extend this protection in favor of persons who had in good faith, and without any fraud on their part or intentional misrepresentation with a view to deceive, effected insurance, by providing that in such cases immaterial representations, or those which proved to be immaterial, should not avoid the policy. It is our opinion, therefore, that the remedial provisions of the statute of March 23d, 1874, do not extend to cases where the 'representations made in obtaining or securing the policy' were knowingly false, and made with a view to mislead or deceive the company. As to such representations, the statute does not change the law, and, therefore, if the said John H. White untruly answered in the application that he had never been addicted to the use of alcoholic beverages or opium, and untruly answered that he had not been attended by a physician for a long time, and these answers, or either of them, were known to him to be untrue at the time they were made, and were made to deceive and mislead the company, then the policy is avoided and there can be no recovery thereon, although the matter so untruthfully answered did not contribute to his death. But if these answers in the application were made in good faith—if, when made, the said White supposed they were true, and did not intend to deceive, then, under the statute, the mere fact that they were not true does not defeat the policy; it must be further shown that the matter misrepresented contributed to produce or hasten death."

JOHN S. HARRIS, SETH E. WARD, and HENRY MUHLBACH,
 plaintiffs in error, v. JAMES C. BABBITT, defendant in error.

1. Suit upon the official bond of the cashier of a savings bank, incorporated under the laws of Missouri. The statute provided that the officers of the bank should hold their offices for "one year, and until their successors are elected and qualified;" but the statute did not require a bond as part of the qualifications of such officers. A by-law passed by the directors, required the cashier to give bond. Harris was elected cashier by the directors, and on January 16th, 1872, he gave a bond, conditioned for the "faithful discharge of his duty,

Harris v. Babbitt.

in accordance with law, and the charter and by-laws of the bank.” He was re-elected cashier, January 16th, 1873, but gave no new bond, and was allowed by the directors to continue to act without doing so : *Held*, that the sureties were not liable for the cashier's defaults in February and March, 1873.

2. His term of office was *annual*, and the sureties are not liable for defaults happening after another election the next year, and the lapse of a sufficient time to qualify by giving a new bond.

(*Before DILLON, Circuit Judge.*)

Official Bond of Cashier.—Liability of Surety is Limited to his Official Term.

WRIT OF ERROR TO THE DISTRICT COURT. This was an action on the official bond of the plaintiff in error, John S. Harris, as cashier of the Union German Savings Bank, of which the defendant in error is the assignee in bankruptcy.

It is alleged in the petition that the Union German Savings Bank was a corporation organized under the laws of the state of Missouri; that said John S. Harris was, on January 14th, 1872, elected cashier of said bank; that on January 16th, 1872, he, as principal, and Ward and Muhlbach as sureties, executed their bond in the sum of \$25,000, and on the 7th of February, 1872, delivered the same to the bank; that the condition of said bond was, “that if said Harris shall faithfully, honestly, and impartially discharge all his duties as such cashier, in accordance with law, and the charter and by-laws of the bank, then the bond to be void, otherwise to remain in full force and effect.”

The petition assigned the various breaches of the bond.

The answer is a general denial of the breaches set forth in the petition. It alleges that the bond was delivered on the day it bears date, and not on the 7th of February, 1872; that Harris was elected cashier on the 14th of January, 1872, for one year, and no longer; that on the 14th of January, 1873, a board of directors of the bank was elected; on the 16th of January, 1873, the board, at its first meeting, duly elected a president, vice-president, secretary, and cashier, for another year; that at said date, and by said board of directors, said Harris was again elected

cashier of said bank for the ensuing year; that, in pursuance of said election, and with the knowledge of the board of directors, all the officers, including cashier, entered upon the discharge of their duties as such officers, and continued to perform their duties until the corporation was adjudged a bankrupt.

The replication denied that Harris acted under the pretended election in 1873, but insisted that, from January 14th, 1872, and up to March 13th, 1873, he was acting under the first bond and first election; that he never gave bond, or otherwise qualified, under the election of 1873; that no successor in office to said Harris was ever elected or qualified.

On the trial, the plaintiff read in evidence a resolution of the board, made on the 11th January, 1872, which is as follows:

“Resolved, That the bonds required from the different officers for the ensuing year be as follows:

“Cashier, \$25,000; assistant cashier, \$20,000; receiving teller, \$15,000; paying teller, \$15,000; bookkeeper, \$5,000; assistant bookkeeper, \$3,000; messenger, \$2,000; attorney, \$1,000.”

The defendants proved, from the record of the board of directors, that on January 11th, 1872, the “new board-elect met, pursuant to requirements of the by-laws,” and “proceeded to the election of permanent officers for the ensuing year, with the following result,” and, among others, Harris was elected cashier.

On January 14th, 1873, a new board was elected, said Harris being one of them; and, on January 16th, 1873, this new board met, took the oath, elected temporary officers, and then proceeded “to elect the regular officers to act as such for the ensuing year,” and, among the others, Harris was again elected cashier, and the board adjourned to the next regular meeting, “to receive the bonds of the different officers as elected.”

There was no meeting of the board held, as the by-laws required, on the first Tuesday of February or March, 1873, and the first meeting of the board after the election of officers, on the 16th January, 1873, was held on the 13th March, 1873. None of the officers elected on the 16th January, 1873, gave bond for that year.

Harris v. Babbitt.

The jury, under the instruction of the court, found a verdict for the plaintiff for \$19,168.15, but they specially found that the two breaches of the bond, on which the verdict was based, did not severally occur until February 11th, 1873, and March 12th, 1873.

Judgment was rendered on the verdict, and the sureties sued out this writ of error.

The controlling question in the case was, whether the sureties on the bond of the cashier, executed on the 16th day of January, 1872, were liable for his default, on the 11th day of February, and the 12th day of March, 1873. The district court instructed the jury that they were liable.

The other material facts appear in the opinion of the court, which was orally pronounced, and is reprinted from the notes of the short-hand reporter.

F. M. Black and *James F. Mister*, for the plaintiffs in error.

Henry Flanagan and *Karnes & Ess*, for the defendant in error.

DILLON, *Circuit Judge*.—This is an important case, alike in the amount and in the principles involved. It has been very fully argued by counsel, who, with commendable industry, on one side and the other, have brought before me all the authorities touching the question on which the case turns. If my engagements would permit, I would like to look into it further, and reduce my views to writing. As I may not get time at an early date to do this, and as it is not likely that further examination and reflection would change my views, I proceed to dispose of the case at this time.

The plaintiff below, Babbitt, is the assignee in bankruptcy of the Union German Savings Bank, and Harris and the other defendants, as his sureties, are sued in respect of the alleged liability of Harris, on his official bond, as the cashier of that bank. The sureties alone defend. The bank is a savings bank, incorporated under the laws of this state, and the statute contains a provision applicable to this controversy, to which I will refer

presently. The sureties make defence, and the leading question in the case is, whether they are liable on this bond for the default of their principal, for breaches of its condition by him, after the term for which he was elected had expired ; and that depends, primarily, on the question whether his election, in 1872, and his term of office, are to be considered *as annual*. He was elected cashier on January 14th, 1872, for one year, or, if the statute applies, for one year, and until his successor is elected and qualified. On January 16th, 1873, there was another election, and he was again elected by the directors his own successor, *but he never gave any new bond*. This suit is on the bond originally given, dated January 16th, 1872.

The by-laws of this institution provided for monthly meetings of the board of directors, and if these meetings had been held, there would have been a regular meeting of the board of directors on the first Tuesday of February after this new election, on January 16th, 1873, and another such meeting in March. Several breaches of this bond are alleged, but all of them were after the time fixed for the February, 1873, meeting.

Now, the question is, whether the sureties on the bond, given in January, 1872, are liable for these breaches. The only provision of statute applicable to this question, is section 3 of the act in relation to savings banks, which is as follows: "The affairs and business of any such association shall be managed and controlled by a board of directors, not less than five nor more than thirteen in number, from whom shall be designated by themselves a president, a *cashier*, and secretary, *who shall hold their offices for one year, and until their successors are duly elected and qualified.*" There is no provision of *statute*, so counsel on both sides state, in terms requiring the cashier to give a bond, but there is a provision of statute authorizing the *directors* to make by-laws, and these by-laws were made by the directors, who elected the cashier, who were the managing officers of the institution, and not by the stockholders, or by the body of the corporation at large. Among other by-laws ordained by the directors, was one to this effect: "The officers of the bank, before

Harris v. Babbitt.

entering on the duties of their respective offices, shall execute to the bank an obligation, with two or more sureties, as follows : 'Cashier, \$25,000,' etc.

The bond in suit, dated January 16th, 1872, is in the penal sum of \$25,000, with this condition: "The condition of the above obligation is such, that whereas the above named John S. Harris has been duly elected cashier of the Union German Savings Bank, of Kansas City, Missouri, now, therefore, if the said John S. Harris shall faithfully, honestly, and impartially discharge all his duties as such cashier of the Union German Savings Bank, of Kansas City, Missouri, in accordance with the provisions of law and the charter and by-laws of the said bank, then this bond to be null and void ; otherwise to remain in full force."

On the trial, the defendants, the sureties, asked the court to instruct the jury as follows: "That the office of the defendant Harris, as cashier, is *an annual office*, and if said Harris was elected cashier on the 16th of January, 1873, that is, after the year for which this bond was given, and if he was allowed to go on during the remainder of the said month, and in the months of February and March following, without giving a new bond, then these sureties are not liable for acts of said Harris after the said new election;" which the court refused, and gave this: "I instruct you that the bond sued on is governed by the statute of this state relating to savings banks, and that this bond, under the statute, should be so construed as to produce no interregnum in the office of cashier. I therefore instruct you, these sureties are liable for said acts of Harris, cashier, up to the commencement of the month of March, 1873."

Now, then, in the first place, as to the authorities in relation to the official bonds of public officers: Under the statutes of various states in this country, public officers are elected pursuant to statutory provisions, which fix their term of office, and in many cases they are elected annually. That is the case in all the New England states. In the New England towns there is an *annual* meeting, at which the officers are elected, where the citi-

Harris v. Babbitt.

zens assemble, and elect their town officers in a government of pure democracy. They are elected annually, at these annual meetings, and there is usually in these states a provision to prevent an interregnum, that these officers shall continue to hold their offices, not only for a year, but until their successors are elected and qualified.

A great many years ago, in Massachusetts, the question arose, which is presented in this case, whether, under such a provision, the sureties of an officer elected for a year, but where the default in his official duties occurred after the year, but before his successor had qualified, were liable in respect to such default. It came before the supreme court of Massachusetts in *Bigelow v. Bridge*, 8 Mass. 275, and that court decided that there was no such liability. The same question arose afterwards in *Chelmsford v. Demarest*, 7 Gray, 1, when Chief Justice SHAW was on the bench, and a thorough examination of it was made. The court held the same way—that the office was annual, and that where the condition of the bond was that the officer should hold until his successor was elected and qualified, that such a condition did not cease to make it an annual office, so far, at all events, as the sureties were concerned. That ruling has been accepted, wherever it has come in question, by all the New England states. In New Hampshire (*Dover v. Twombly*, 42 N. H. 59), in a fully considered opinion, and in Connecticut (*Welch v. Seymour*, 28 Conn. 387) the views of the supreme court of Massachusetts have been followed, and they have been adopted in other states. (See *Moss v. State*, 10 Mo. 338; *State Treasurer v. Mann*, 34 Vt. 371; *Mayor and Council v. Horn*, 2 Harrington [Del.] 190; *Insurance Co. v. Smith*, 2 Hill [S. C.] 590 [258]; *South Carolina Society v. Johnson*, 1 McCord, 41; *Committee of Public Acts v. Greenwood*, 1 DeSaussure [S. Car. Chan.] 450; *County of Wapello v. Bingham's Administrator*, 10 Iowa, 40; 38 New Jersey Law, 254; *Insurance Co. v. Clark*, 33 Barb. 196.)

In some of the states, notably North Carolina, Indiana, perhaps Maryland, possibly Mississippi, where the same question has come up, the courts have decided the other way, and have

Harris v. Babbitt.

held, under the clause that "he shall hold until his successor is elected and qualified," that there may be a liability on the sureties for a term extending beyond the year. (*State v. Berg*, 50 Ind. 496; *Thompson v. State*, 37 Miss. 578; *Placer County v. Dickenson*, 45 Cal. 12; *State v. Daniel*, 6 Jones [N. C.] Law, 444; *Sparks v. Bank*, 9 Am. Law Register, N. S. 365.) But I must say, in regard to these decisions, that those courts do not seem, in general, to have had their attention called to the reasoning on the other side, and are not as fully considered, in my judgment, as the first line of decisions to which I have referred.

But, when we look at the peculiarities of the present case, I think it can be distinguished from even the latter line of decisions, and that, if they were admitted to be correct in respect to *public* officers, still it could be possible, on just and solid grounds, to distinguish this case from those. Now, what is this action, when we get to the bottom of it? The plaintiff is the assignee in bankruptcy of this bank, and the legal rights of the parties are precisely the same, in my judgment, as though this bank had never been thrown into bankruptcy; as if this default had occurred, and the bank had continued to be solvent, and the bank itself had brought this same action instead of the assignee in bankruptcy. Nothing is clearer than that, under the Missouri statute, it is contemplated that these officers shall be elected annually, for such is the express provision, that there shall be designated a cashier, who shall hold his office for one year, and until his successor is elected and qualified; and the provision is, there shall be an annual election, that the directors shall be elected annually, and the directors are annually to select their own cashier. A cashier that is satisfactory to one board of directors may not be to another, and they are to elect him each year. In accordance with this provision, they held their election January 16th, 1873, and they elected a new cashier—that is to say, they elected Mr. Harris his own successor, but neither he nor any of the other officers gave any new bond.

Now, what is the object of the bond in suit? It is not like official bonds, which are intended to protect the public, and

Harris v. Babbitt.

where, unless the provisions of the statute are complied with, the public are comparatively helpless. If a public officer gives an insufficient bond, a citizen may know it, but how can he help it? In this case, however, the bond is required for the indemnity of the private corporation. Who were managing the corporation? The directors. Where is the fault in this case? With whom rests the laches that led to this default? The retention of this cashier without giving a bond—whose fault is that? Who neglected their duty in that regard? It was the officers of this corporation—the men entrusted by the stockholders to manage its affairs. They are in fault for not requiring the bond. Now, then, as between the assignee representing this corporation, whose agents are to blame—who shall suffer? The sureties who engaged for Harris's performance of his duties for one year, or until his successor is elected and qualified, were blameless, and cannot reasonably be supposed to have intended to undertake an obligation of interminable duration; for if they can be held for what happened in March, 1873, they can be held for what happened in December, 1873, and so on indefinitely. Who is to blame? Who ought to suffer? It is to be observed in this case that the *statute* does not require a bond. It says, indeed, that officers shall hold their office until their successors are duly elected and qualified. How qualified? It was conceded in the argument, that if this board of directors, in January, 1873, had passed a by-law or resolution, "we dispense with bonds," the bank would have been bound by it; and still, it is perhaps true that this body, having enacted a by-law requiring bonds, they could not be dispensed with without a repeal of the by-law, although the question of *estoppel*, or waiver of the by-law, might arise, where the directors are the very parties having full control of the matter; but it never could arise if the *statute* had in terms required a bond.

Under these circumstances, whatever may be the true rule in respect to annual terms of public officers, where it is expressly required by the statute that there shall be qualification by giving of a bond, I am of opinion that, on the facts of this case, these

Lathrop v. Nelson.

sureties ought not to be held liable for defaults which happened at a time, in February, 1873, after a monthly directors' meeting had passed, and these men had failed to require the new cashier, he being his own successor, to give bond. The judgment of the district court is reversed, and a new trial ordered.

REVERSED.

GARDINER LATHROP, Assignee, etc., plaintiff in error, v. R. H. NELSON *et al.*, defendants in error.

1. A mortgagee of real estate in Missouri, who becomes the purchaser thereof at a sale made by a trustee under a power of sale in the mortgage, in which sale the assignee in bankruptcy of the mortgagor joined, by order of the bankruptcy court, was held, under the circumstances, entitled, as against the assignee in bankruptcy, to the rents and profits of the estate sold, for the period intervening between the day of sale and the date of the confirmation of the sale by the bankruptcy court.
2. In general, the confirmation of a sale by the court relates back to the time of the sale, and entitles the purchaser to the intermediate rents and profits; but this rule may, of course, be changed by statute, and may, *it seems*, yield to countervailing equities arising out of special circumstances.

(Before DILLON, Circuit Judge.)

Who Entitled to Rents and Profits for the Period Intervening Between the Sale and the Confirmation of the Sale.

ERROR TO THE DISTRICT COURT. This case came up in the district court on a demurrer to the answer as not stating facts sufficient to constitute a defence. The demurrer was sustained by the district court, and the defendant, Lathrop, declining to plead further, final judgment was rendered against him, to reverse which he has prosecuted this writ of error.

The defendant below is the assignee of an estate in bankruptcy, to which certain real property belonged, upon which

Lathrop v. Nelson.

plaintiffs held a deed of trust to secure a note of the bankrupts for \$8,000. A sale of said real estate by the defendant, in conjunction with the trustee, under the deed of trust, was ordered—subject expressly to the approval of the district court. The sale was made on the 8th day of May, 1875, and the property struck off to the plaintiffs at the sum of \$6,200. The sale was not confirmed by the court until the 28th day of February, 1876, when the assignee, defendant, was ordered to tender a deed and demand a credit of the purchase price upon the note. The deed was executed and delivered, and the credit of \$6,200 made on the note held by plaintiffs, on the 29th day of February, 1876. The property did not sell for enough to pay the mortgage debt due to the plaintiffs below. The credit was so indorsed on the note as to stop interest from the date of the sale, on the 8th day of May, 1875, if the sale should be confirmed and the debtor should be entitled to have the credit made as of the day of sale. Between the 8th day of May, 1875, and the 29th day of February, 1876, the defendant had collected rents from the property to the amount of \$962.55, being all the time in possession. The suit was brought to recover these rents. The answer set up the above facts as a defence, claiming the said rents as general assets, and offering to let plaintiffs come in as general creditors for the remainder of their debt.

Mr. G. Lathrop, for the plaintiff in error.

Gage & Ladd, for the defendants in error.

DILLON, *Circuit Judge*.—The question presented is, which of the parties, under the circumstances, is entitled to the rents and profits of the estate for the period intervening between the date of the sale and the date of the confirmation. The order of sale was silent in this respect.

The contest is between the mortgagees, who afterwards became purchasers of the mortgaged property for less than their debt, and the assignee in bankruptcy, representing the unsecured creditors of the bankrupt. It is not shown that the delay in the con-

Lathrop v. Nelson.

firmation is attributable to the acts or conduct of the plaintiffs below.

It is true that no title passes until the sale is confirmed (*Williamson v. Berry*, 8 How. 546; *re O'Fallon*, 2 Dillon, 548). But when the sale is confirmed, if there are no equitable circumstances, and no statute to change the general rule, the rights of the purchaser relate back to the date of the sale, so as to entitle him to the rents and profits for the intermediate period. Such is the settled doctrine of the English courts. The state of the decisions in England on this subject is well shown by the judgment of Lord Chancellor SUGDEN, in *Vesey v. Elwood* (2 Dru. & War. 74). He attempts to reconcile what has been sometimes supposed to be a conflict in Lord ELDON's views, in *ex parte Minor* (11 Vesey, 559), and in *Anson v. Tougood* (1 Jac. & Walk. 617), and adds: "It appears to me that these cases are fairly distinguishable; and if not, that *ex parte Minor* is not the case which ought to be followed." * * "The court has great power over these contracts [sales by masters under decrees], and it might feel itself at liberty to throw a loss by fire, before the confirmation of the report, upon the sellers," as in *ex parte Minor*. Such a power is not inconsistent with the doctrine that when the chancellor's power to open a sale is not exercised and the sale is confirmed, that the rights of the purchaser relate back to the time of the bidding (*Trefusis v. Lord Clinton*, 2 Sim. 359).

Usually, the doctrine of relation back works justly and equitably. The bidder must be ready at all times to keep his bid good. Frequently he must pay the amount thereof at the time the bid is made, and when this is the case he loses, of course, the use of his money. The time of the confirmation is uncertain. If he loses interest or the advantageous use of his money, he should have the rents and profits as compensation. The application of this rule does not, in such cases, injure the owner, as it will enhance the price which purchaser can afford to pay. There may be cases where the application of the general rule above stated would be inequitable. In such an event, the rights of the parties in interest can be settled on some other basis.

Lathrop v. Nelson.

The English doctrine on this subject seems to be supported by the weight of American authority (*Taylor v. Cooper*, 10 Leigh, 317; *Wagner v. Cohen*, 6 Gill [Md.], 102); but the decisions are conflicting (*Armstrong v. McClure*, 4 Heisk. [Tenn.] 80; *re Bledsoe*, 12 Bankr. Reg. 402, affirmed by the circuit court, January, 1875).

Without intending to assert that there is any invariable rule on this subject which will apply in all cases, my judgment is that, under the facts here presented, and as between these parties, the doctrine of relation back is just in its operation, and the plaintiffs below are entitled, as against the assignee in bankruptcy, to the rents which accrued intermediate the sale and the confirmation.

This conclusion is not in conflict with any statute of the state of Missouri. On the contrary, the statutes of Missouri, prior to the act of May 15th, 1877, give no redemption from sales by a trustee under a power in the deed of trust. The trustee alone might have made the sale, and no confirmation by the bankruptcy court would have been necessary. In this event the purchaser would have been entitled to immediate possession. As the mortgaged estate was not worth the debt secured by the mortgage, the bankruptcy court, or the assignee, as it turned out, had no real concern in the matter; and their intervention should not have the effect to deprive the mortgagee of substantial rights given him by the mortgage and the laws of the state.

"The assignee in bankruptcy is not required," says the supreme court of the United States, "to take measures for the sale of mortgaged property unless its value is greater than the encumbrance. His duties relate chiefly to the unsecured creditors, and he need not trouble himself about encumbered property unless something may be realized out of it on their account, or unless it becomes necessary to do so in order to ascertain the rights of the secured creditor in the general estate." (*McHenry v. La Societe Francaise*, October term, 1877—5 Otto, 58.)

The judgment below is affirmed.

AFFIRMED.

Lathrop v. Nelson.

NOTE.—The following is an extract from the argument of Mr. Lathrop, for the plaintiff in error:

"The plaintiffs below cannot claim as vendees from the 8th day of May, A. D. 1875, because the sale was not complete until confirmed, on the 28th day of February, A. D. 1876, by the court. The sale was made on the express condition of its being approved by the court, and the condition was not complied with until the 28th day of February, A. D. 1876. Until then, the sale was inchoate—a mere offer by the plaintiffs, accepted by the defendant, but requiring the acceptance of the court before making it complete. Two acts were necessary to make a valid sale—the act of defendant in striking off the property, and the act of the court in approving and confirming what the defendant had done. One was as essential as the other, and until the court had acted, there was no sale. The title did not pass until these formalities were complied with, and until the title passed the plaintiffs cannot claim as vendees. (Rorer on Judicial Sales, secs. 2, 6, 7, 13, 15, 124, 134; *Williamson v. Berry*, 8 How. 546; in *re O'Fallon*, 2 Dillon, 548.)

"The doctrine of relation cannot be invoked so as to make plaintiffs entitled to the rents from the 8th day of May, 1875. The defendant, having remained in possession and collected the rents, is entitled to hold them as general assets up to the day when the confirmation of the sale was had, the price paid by the plaintiffs, and the deed to the property executed and delivered." (*Armstrong v. McClure*, 4 Heisk. [Tenn.] 80; *vide in re Bledsoe*, 12 Bankr. Reg. 402; *Perkins v. Reed*, 1 Swan, 80.)

The following is an extract from the argument of Messrs. Gage & Ladd, for the defendants in error:

"The confirmation by the court and the conveyance related back to the time of the sale, and the purchasers became entitled to the rents and profits for the intervening period. (*Taylor v. Cooper*, 10 Leigh, 318; *Wagner et al. v. Cohen*, 6 Gill, 102-3; *Castleman v. O. & T. Bell*, 2 B. Mon. 158. *Contra*: *Armstrong v. McClure et al.* 4 Heisk. 80.)

"In the first case (10 Leigh, 318), TUCKER, J., states the law as follows: 'I have not the slightest doubt of the right of Cooper, the purchaser, to the rent in question. The principles of the court, according to the English practice, I take to be clearly these: * * * But, thirdly, when the sale is confirmed, that is where both contracting parties (the purchaser and the court) concur in ratifying the inchoate purchase, the confirmation relates back to the sale, and the purchaser is entitled to everything that he would have been entitled to if the confirmation and conveyance had been contemporaneous with the sale. (*Anson v. Towgood*, 1 Jac. & Walk. 617.) * * * The report having been confirmed, he must be considered complete owner from the date of the sale, and, of course, entitled to the rent becoming due after it.'

Lathrop v. Nelson.

"In the second case cited (6 Gill, 102), it is said: 'Although this is the character of the imperfect right acquired by a purchaser at a sale of this kind, yet it gives to him an inchoate and equitable title which becomes complete by the ratification of the court. When this is accomplished, the ratification retroacts and he is regarded by relation as the owner from the period of the sale. He is, as such proprietor, entitled to the intermediate rents and profits of the estate.'

"To the same effect is the third case cited (2 B. Mon. 158).

"The case in 4 Heisk. 80, is in direct opposition to the above. The court seems to have considered the question as settled by a prior decision (1 Swan, 82). The latter case was a sale of school lands, and a statute provided that the title should remain in the state until payment of the purchase money, which was after confirmation. In that case there could be no possible room for the operation of the doctrine of relation. The Tennessee court, however, defends its own position and disapproves of the conclusion reached by other courts, and in this is opposed to all authority.

"This is the English doctrine, as held by Lord ELDON in *Anson v. Towngood*, 1 Jac. & Walk. 617; by Sir WM. GRANT in *Fluyder v. Crocker*, 12 Ves. Jr. 28; by Lord LYNDEHURST in *Trefusis v. Lord Clinton*, 2 Sim. 359; and most decisively by Sir ED. SUGDEN in *Vesey v. Elwood*, 3 Dru. & War. 79. In this last case it is shown that the objections to the consistency and justice of the doctrine referred to in the Tennessee case, do not exist.

"The doctrine of relation as applied to confirmations of judicial sales is eminently just and wise. The bidder at the sale is bound to be ready with his money at all times. Confirmation may be made any day. It may also be delayed. If he knows that he is to have the rents as compensation for interest, he knows what he is buying; otherwise not. The security of the purchaser is also the advantage of the seller in the matter of price.

"It is an old rule, settled by the judgment of the wisest judges, and it ought not to be set aside in this case, where the purchasers, who are also the mortgagees, have already been deprived of a large amount of the rents of the mortgaged property for the benefit of the general creditors, to which rents the general creditors were in no manner entitled."

Darlington v. LaCledé County.

DARLINGTON v. LACLEDE COUNTY.

Bonds issued by the defendant county in 1870, under the act of January 11, 1860, to the LaCledé and Fort Scott Railroad Company, are valid in the hands of an innocent holder, although not sanctioned by a popular vote, and although the said railroad company—the payee—was not at the time a corporation *de jure*.

(Before DILLON and KREKEL, JJ.)

Municipal Bonds.—Recital.—Preliminary Condition.—Valid Though Issued to a Company not a Corporation de jure.

THE facts, as agreed upon, are these:

1. That this action is brought for the collection of interest coupons originally attached to bonds of the following tenor and terms:

United States of America, State of Missouri.

“No. —. Twenty years. \$1,000.

“Interest seven per cent, payable semi-annually, on the first days of January and July in each year.

“Know all men by these presents: That the county of LaCledé, in the state of Missouri, acknowledges itself indebted and firmly bound to the LaCledé and Fort Scott Railroad Company in the sum of one thousand dollars, which sum the said county, for value received, hereby promises to pay to said company or bearer, at the National Bank of the State of Missouri, twenty years after date, with interest thereon from the date hereof at the rate of seven per cent per annua, payable semi-annually, on the first days of January and July of each year, on the presentation and delivery at said bank of the interest coupons hereto attached. The county hereby reserving the right to redeem this bond at any time after the expiration of ten years.

“This bond is issued pursuant to the order of the county court of the county of LaCledé, made on the 17th day of August, 1869, by authority granted in the charter of the LaCledé and

Darlington v. LaClede County.

Fort Scott Railroad Company, by an act of the general assembly of the state of Missouri, entitled 'An act to incorporate the LaClede and Fort Scott Railroad Company,' approved January 11th, 1860. In testimony whereof, the said county of LaClede has executed this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same, and affixing hereto the seal of said court. This done at the office of said clerk of said court, this 1st day of July, A. D. 1870.

[SEAL.]

"Attest:

"JOHN W. SMITH,

Presiding Justice County Court.

"J. T. TALLIOFERRO, *Clerk County Court.*"

And the said coupons are each of the following terms and tenor :

"(\$35.) LEBANON, LACLEDE COUNTY, MISSOURI.

"The county of LaClede, state of Missouri, will pay to the bearer, at the National Bank of the State of Missouri, at St. Louis, Missouri, on the 1st day of —, 18—, thirty-five dollars, being the semi-annual interest due on bond No. —.

"JOHN W. SMITH,

"Attest:

Presiding Justice County Court.

"J. T. TALLIOFERRO, *Clerk County Court.*"

2. That by an act of the general assembly of the state of Missouri, entitled "An act to incorporate the LaClede and Fort Scott Railroad Company," approved January 11th, 1860, it was, *inter alia*, enacted as follows: "SEC. 14. It shall be lawful for the county court of any county in the state to subscribe to the stock of said company (the LaClede and Fort Scott Railroad Company), or invest its three per cent fund, or any other internal improvement fund belonging to the county, as stock in said road, and for the stock subscribed in behalf of the county, may issue the bonds of the county to raise the funds to pay the same, and, to take proper steps to protect the interests of the county,

Darlington v. LaCledé County.

may appoint an agent to represent the county, vote for it, and receive its dividends."

3. That on the 1st day of June, 1860, six of the corporators named in said charter met, pursuant to a call for that purpose, at Stockton, Missouri, to organize the LaCledé and Fort Scott Railroad Company, and a board of directors, and at said meeting said persons selected themselves, and added one Dodson, who was not present at said meeting, as directors, and said directors elected a president, secretary, and treasurer, which was the only meeting this board ever held, and no by-laws were adopted or subscription books opened, nor subscriptions made to the stock of said company, and the records or minutes of said meeting are not known to exist at present. That from the first Monday of June, 1860, to the first Monday of June, 1869, no meeting was held to organize a board of directors, and no subscription books were opened during that period of time, nor was any survey made of said proposed railroad, nor any work done thereon of any kind. That on said first Monday of June, 1869, another meeting was held by persons, two of whom were named as corporators in said charter, at Bolivar, Missouri, to organize the LaCledé and Fort Scott Railroad Company, and certain six persons were named at said meeting as directors, who proceeded to designate officers, adopt by-laws, and take subscriptions to capital stock, and to perform acts for and in the name of the LaCledé and Fort Scott Railroad Company.

4. That the association claiming to be organized as the La Cledé and Fort Scott Railroad Company commenced the construction of its railroad in the county of Vernon, Missouri, between Nevada and Fort Scott, in the year 1869, but did not commence the construction of its railroad in the counties of LaCledé or Dallas until the spring of 1870.

5. That the constitution of the state of Missouri, which went into effect on the 4th day of July, 1865, by section 14, article XI., provided: "The general assembly shall not authorize any city, county, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless

Darlington v. LaClede County.

two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

6. That the county court of LaClede county made and adopted the following orders, and caused the same to be entered of record, viz.:

"On the 17th day of August, 1869. It is ordered by the court, that one hundred thousand dollars be, and the same is hereby, subscribed to the capital stock of the LaClede and Fort Scott Railroad Company, for and on behalf of the county of LaClede, upon the following expressed conditions, and none other." [Here follows the conditions.]

"On the 14th day of June, 1870. Ordered by the court, that the president and the clerk of this court be, and they are hereby, authorized and directed to sign and countersign, under the seal of the court, the bonds prepared and directed to be issued under the order of this court, dated August 17, 1869, to pay the subscription of one hundred thousand dollars to the capital stock of the LaClede and Fort Scott Railroad Company, and, when signed and countersigned as aforesaid, shall notify the president of said company that the same are ready to be delivered, in accordance with said order.

"It is further ordered that Charles W. Rubey be, and he is hereby, appointed county railroad agent, under the provisions of the order of this court made as aforesaid, August 17, 1869; and upon his giving bond in the penalty of two hundred thousand dollars, to be approved by the court, or the clerk thereof in vacation, the clerk shall deliver to him the bonds aforesaid, to be disposed of by him as provided in said order.

"Further ordered, that the clerk of this court keep a correct record of the issue and delivery of the said bonds—John W. Smith and John Esther concurring, and James Partlow dissenting."

7. That the taking of stock in the LaClede and Fort Scott Railroad Company, or the issue of bonds thereto by the county of LaClede, was never submitted to the voters of LaClede

Darlington v. LaClede County.

county, and that many of the people of LaClede county, at and before the taking of said stock and the issue of said bonds, remonstrated with the county court of LaClede county against taking any stock in said company or issuing bonds therefor.

8. That in the year 1870 one hundred bonds, of the form and tenor hereinbefore set forth, were signed by the said John W. Smith, styling himself and then acting as the presiding justice of the county court of LaClede county, and attested by one J. T. Talloferro, who was then the clerk of said court, and sealed with the corporate seal of said county affixed by said clerk, of which the bonds mentioned and described in plaintiff's petition were a part.

9. That subsequently, in the year 1870, said bonds were sold by the officers of said county, in the city of St. Louis, for cash, at prices ranging from fifty-five to sixty-five cents on the dollar of their par value, which prices were then and there the fair market value of said bonds, and the proceeds thereof were disbursed by said county's railroad agent in paying for the construction of the railroad bed or grading of said railroad company within the boundaries of said county; all of which was done pursuant to and in accordance with the terms and conditions of said orders of subscription.

10. That said county received from said railroad company, in consideration of said bonds, or the proceeds thereof, certificates for one thousand shares of full-paid capital stock, having a par value of one hundred dollars per share, amounting in the aggregate to one hundred thousand dollars, and said county now still holds and owns said stock and certificates, but the said stock has a market cash value of only ten cents on the dollar, and its highest market cash value in St. Louis, for any prior year, did not exceed thirty-five cents on the dollar.

11. That said county subsequently claimed and exercised its rights as the holder and owner of said one thousand shares of stock, at the meetings and elections of the stockholders of said railroad company in the years 1870, 1871, 1872, and 1873, by its county railroad agent appointed for such purpose.

Darlington v. LaCledé County.

12. That the county court of said county levied, and caused to be collected, special taxes, in the years 1871 and 1872, for the payment of the interest upon the said bonds, and applied the funds so raised by taxation to the payment of the first three installments of semi-annual interest on said bonds, represented by coupons that were detached therefrom and surrendered to said county, and to these taxes, and to the payment thereof, many citizens and tax-payers of LaCledé county objected, on the ground that the whole of the proceedings for the issue of bonds to said railroad, and the levy of taxes for the interest thereon, was illegal, unconstitutional, and void. And from the spring of the year 1873, the county of LaCledé, by its constituted authorities and its county court, has refused the payment of taxes on account of said bonds, for the same reasons last above stated.

13. That the plaintiff herein is the purchaser and holder of the bonds and coupons mentioned in his petition, before maturity, in the usual course of business, at the market rate at which they were selling at the time, and he did not know anything against the validity of the bonds at the time he bought them, but if there was any constitutional, legislative, or other legal objection that may appear in law or equity against the validity of the bonds, the defendant is entitled thereto in its defence.

Joseph Shippen, for the plaintiff.

Britton A. Hill, for the defendant.

DILLON, *Circuit Judge*.—By the agreed statement of facts herein, it appears that this is an action by a *bona fide* holder of bonds issued by the defendant to the LaCledé and Fort Scott Railroad Company or bearer.

The bonds recite as follows: "This bond is issued pursuant to the order of the county court of the county of LaCledé, made on the 17th day of August, 1869, by authority granted in the charter of the LaCledé and Fort Scott Railroad Company by an act of the general assembly of the state of Missouri, entitled 'An act to incorporate the LaCledé and Fort Scott Railroad

Darlington v. LaCledé County.

Company,' approved January 11, 1860." This act has the following provision: "SEC. 14. It shall be lawful for the county court of any county in the state to subscribe to the stock of said company, or invest its three per cent fund, or any other internal improvement fund belonging to the county, as stock in said road, and for the stock subscribed in behalf of the county may issue the bonds of the county to raise the funds to pay for the same, and, to take proper steps to protect the interests of the county, may appoint an agent to represent the county, vote for it, and receive its dividends." The twenty-second section exempts this charter from the general statutes of the state with certain specified exceptions.

In this case no popular vote was taken. The defendant's first position is that the true construction of this charter, in connection with the then existing general law, required a vote of the people of the county to authorize the subscription to the stock and the issue of bonds. If the charter stands alone, there was no need of any vote; but if the general law is to be construed with the charter, then there is room for the defendant's argument. Under the well established doctrine of the United States supreme court it might be conceded, for the purpose of this case, that a vote was necessary, and yet the defendant would be estopped by the recitals of the bonds. The holder for value is authorized to suppose that a vote, if required, was had. Such is the ruling in the cases of *Humboldt Township v. Long*, and *Marcy v. Oswego Township*, and *Coloma v. Eaves*, reported in 2 Otto, 637, 642.

In all the cases in the supreme court of the United States, that tribunal has held that the municipal or local officers were constituted the judges to decide whether antecedent or preliminary steps or conditions have been complied with, and that their decision, stated or implied in the recital, was conclusive against the corporate maker when the bonds have found their way into the hands of innocent holders. The supreme court so decided long ago, in the case of *Knox County v. Aspinwall*, and the principle has been affirmed time and again.

The defendant's second objection is that the railroad company

Wilkinson v. Babbitt.

was not a corporation *de jure*. The county issued its bonds payable to said railroad company, which was an admission that it was a corporation. Under the agreed statement of facts there can be no question but that it was a corporation *de facto*. The company issued to the county its stock, and did work upon the projected railroad. On the other hand, the county issued its bonds to the company. Against these securities, in the hands of a *bona fide* holder, the county defends on the ground that the railroad company was not duly and legally organized.

The defendant is estopped to make this defence. This point has been decided the same way by the supreme court of Missouri.

Upon the agreed statement of facts, we hold that the plaintiff is entitled to judgment upon his coupons.

KREKEL, J., concurs.

JUDGMENT FOR PLAINTIFF.

C. B. WILKINSON, appellant, v. JAMES C. BABBITT, Assignee.

The complainant, as collector of internal revenue, held not entitled, by way of subrogation, to the rights of the United States as a preferred creditor.

(Before DILLON, Circuit Judge.)

United States as a Preferred Creditor.—Subrogation.

THIS was an appeal from a decree of the district court sustaining a demurrer to the bill of complaint and dismissing the bill.

The bill charged that the defendant is the assignee in bankruptcy of the Union German Savings Bank; that the bank had been adjudged a bankrupt April 3d, 1873; that at the time of the bankruptcy there was on deposit in the bank \$1,062.62, moneys belonging to the United States, which had been placed there by one Voede, who, at the time of such deposit, was a deputy collector under the complainant, who was collector of internal revenue; that the moneys so deposited were moneys arising for collections of internal revenue. The complainant, as re-

Wilkinson v. Babbitt.

quired by law, paid the aforesaid sum into the treasury. The complainant, in his bill, claimed that by the deposit of the money in the bank he became the surety of Voede, and of the bank to the United States; and that the United States, until the 3d of April, 1873, had a cause of action against the bank and Voede; and that, by virtue of the payment of the said sum of \$1,062.62 to the United States by complainant, he became entitled to the preference of the United States as against the bank, and asked to be so subrogated as a preferred creditor.

The defendant demurred.

James S. Botsford, for the appellant.

Henry Flanagan and *H. N. Ess*, for the respondents.

DILLON, *Circuit Judge*.—The deposit of the money by Voede in the Union German Savings Bank was the act of complainant; the deputy, who is his appointee, authorized by law, derives the breath of life from the collector—is appointed by, and receives his pay from, and is removable at the pleasure of, the collector. The deposit of money in the bank did not create the bank the principal debtor, and the complainant the surety. The various sections of the internal revenue act of 1862 show that the collector is the only person known to the law as the custodian of the revenue collected, until it is paid into the proper depository. While the doctrine of subrogation, which entitles the surety to all of the liens and securities of the creditor, on paying the latter the debt of the principal, is fully recognized in equity, and in certain cases at law, this is not a case for its application, and complainant is not entitled to be subrogated to the rights of the United States as a preferred creditor against the bank; and, moreover, under the acts of congress, the deposit of the money in the bank, by Voede or Wilkinson, was positively forbidden, and the deposit there was unlawful. The complainant, therefore, is not in a position to ask the aid of a court of equity to give him the fruits of an unlawful act, and to do so would encourage other officers in the violation of the law.

AFFIRMED.

REPORTS OF CASES DETERMINED
IN THE
Circuit Court of the United States,
FOR THE
EASTERN DISTRICT OF ARKANSAS.

SHIRK v. PULASKI COUNTY.

1. Warrants issued by counties in Arkansas are not commercial paper, free from legal and equitable defences in the hands of a subsequent holder, but such holder takes them subject to such defences.
2. Under the laws of Arkansas, warrants issued for more than the sum actually due a claimant in order to make the warrant worth in money the amount of the debt due from the county, are void as to the excess, and may be defended against accordingly. The act of the county authorities, in auditing the claim and issuing the warrants, is not conclusive, as a judicial determination, upon the parties.
3. Under the circumstances, the court treated the holders of such warrants as the equitable assignees of the valid legal claim of the payee, or of the holder's proportionate share of such claim where several warrants were issued therefor, subject to any payments the county may have made to any holder of a warrant representing a portion of such claim.
4. The statutes of Arkansas, as to calling in warrants "in order to cancel, reissue, and classify the same," construed.

(Before DILLON and CALDWELL, JJ.)

County Warrants.—Defences.—Rights of Holder.

THE facts sufficiently appear in the opinion of the court.

Mr. Kimball and *Mr. Rose*, for the plaintiff.

Mr. Brown, for the defendant.

Shirk v. Pulaaski County.

DILLON, *Circuit Judge*.— This is an action upon a great number of county warrants, issued at various times, and of various classes, by the defendant county. Some of these are warrants that were rejected by the county court, under the "calling-in" order of April 19th, 1875; some are warrants which were not presented under that order; some are warrants presented under that order, and reissued by the county court; and some of the warrants rejected, and some of the warrants reissued under that order, are what is popularly known as "five-to-one" or "ten-to-one" warrants. Upon consideration of the demurrer to the answer, which has been fully and ably argued on both sides, the court rules the following propositions:

1. That the order of April 19th, 1875, made under the act of February 27th, 1875 (Laws 1875, p. 189), requiring all outstanding warrants and scrip issued by the defendant county *prior to October 30th, 1874*, to be presented to the county court on or before the 30th day of July, 1875, "in order to cancel, reissue, and classify" the same, was unauthorized and void. Following the decision of the supreme court of the state in *Parcel v. Barnes & Bro.* 25 Ark. 261, the act of February 27th, 1875, above referred to, can only operate on warrants issued *after* that act went into effect. The general law on this subject (Gantt's Digest Laws of Arkansas, sec. 614) prohibits such "calling-in" orders oftener than once in *three* years. It is admitted on the record that there was a previous call by the defendant, in July, 1873, requiring warrants to be presented by the 1st day of October, 1873, and the above mentioned order of April 19th, 1875, was within that period. For these reasons, we hold that the order of April 19th, 1875, was beyond the authority of the county court, and void. We feel more assured of the correctness of this conclusion, since the counsel for both parties conceded that this was the true view; at all events, it was not seriously controverted by the learned counsel for the county.

2. It results as a corollary from the foregoing proposition that the legal rights of the holders of county warrants issued prior to October 30th, 1874, were in no manner affected by the order

Shirk v. Pulaaki County.

of April 19th, 1875. All action under it by the county court was *coram non judice*, and this irrespective of the question as to the effect of the county court not being in session on the 30th day of July, 1875, the time fixed and limited by the "calling-in" order for the presentation of the warrants. Therefore, whether the holders of warrants issued prior to October 30th, 1874, failed to present them under the order of April 19th, 1875, or presented them and they were rejected, or presented them and received reissued warrants, their rights are in no wise affected by what was done under that order. They were not bound to present them under that order; the county, by virtue of that order, had no legal power to reject them; and the warrants reissued under that order derived no validity from the order of reissue which they did not before possess.

3. As to "five-to-one" or "ten-to-one" warrants, so-called. In many cases the county court (according to the answer, which is to be taken as true on the demurrer), for legal fees to county officers, the amount whereof was definitely fixed by statute, and for the support of paupers, and for work and labor in respect of matters which were county charges, issued warrants for five or ten times the legal fees of the officers, or the money or currency value of the support of the paupers, or work and labor done for the county.

The reason for this was the depreciation of warrants, and the corresponding difference between money and warrants. The statute of this state, at the time the warrants were thus issued, contained the following provisions, applicable to this question:

"SEC. 601. It shall be *unlawful* for any board of supervisors to allow any greater sum for any account, claim, demand, or fee-bill against the county, than the amount actually due thereon, *dollar for dollar*, according to the legal or ordinary compensation for services rendered, materials furnished, salaries or fees of officers, or to direct the issuance of county warrants upon such accounts, claims, demands, or fee-bills, for more than the actual amount so allowed, *dollar for dollar*.

"SEC. 602. Before any account, claim, demand, or fee-bill

Shirk v. Pulaski County.

shall be allowed by any board of supervisors, said board shall require the person or persons, or their legal representatives, claiming the same to be due, to attach to said account, claim, demand, or fee-bill, an affidavit that the same is just and correct, and that no part thereof has been previously paid; that the services charged for, or materials furnished, as the case may be, were actually rendered or furnished, and that the charge made therefor does not exceed the amount allowed by law, or customary charges for similar services or materials, dollar for dollar; which account, claim, demand, or fee-bill, together with the affidavit thereto, shall be filed with the county clerk, and kept in his office for the term of ten years, and the same shall be subject to inspection by any member of the grand jury of the county, at each term of the circuit court, or by the prosecuting attorney of the circuit.

"SEC. 603. In all cases the board of supervisors shall require an itemized account of any claim presented to them for allowance, sworn to as required by the preceding section, and may in all cases require satisfactory evidence, in addition thereto, of the correctness of the account, and may examine the parties and witnesses, on oath, touching the same, and shall have power to compel the production of all books, accounts, papers, or documents, which may be necessary in the investigation of any matter coming properly before them, and within their jurisdiction.

"SEC. 604. Boards of supervisors are hereby prohibited from auditing and allowing to any officer any fee or allowance not specifically allowed such officer by law; and in no case shall constructive fees be allowed to or paid officers, by any county of this state.

"SEC. 605. Whenever any allowance shall be made by a board of supervisors, and an order therefor entered upon the records, the county clerk shall, when requested by the person in whose favor such allowance has been made, issue a warrant for the amount of such allowance, which warrant shall be in the following form." [Here follows the form of the warrant.]

It is our opinion that the effect of this legislation is to pro-

Shirk v. Pulaski County.

hibit the county from issuing a warrant for any greater sum than such sum as would pay "the amount actually due" the creditor in money, "dollar for dollar;" a dollar in warrants for each one hundred cents of his demand.

It is probable that, even without such direct prohibition, the county court, unless expressly authorized, would have no such power. And so the point has been adjudged. (*Foster v. Coleman*, 10 Cal. 278.)

4. It is insisted, however, by the warrant-holder, that the auditing of claims by the county court, or by its predecessor, the board of supervisors, and the issuing of a warrant for the amount found due a claimant, is a *judicial act and a judicial determination* of the question of the county's liability, which is binding on both the claimant and the county, unless reversed on appeal, or set aside in some direct manner; and, as a consequence, that the liability of the county on warrants, or the consideration therefor, cannot be inquired into collaterally, or by way of defence to an action on the warrants.

The statute of this state gives the county court power "to audit, settle, and direct the payment of all just demands against the county." (*Gantt's Digest*, sec. 595.) The claimant may appeal from the allowance, or refusal to allow, but it has been decided that the county cannot. (*Chicot Co. v. Tilghman*, 26 Ark. 461.)

There is nothing peculiar in the legislation of Arkansas in the matter of auditing claims and issuing warrants therefor; and it has been decided in many states, and repeatedly, that such settlements have not the force of judicial judgments, which estop or conclude either the claimant or the county. Among the many cases on this subject, the following are directly in point: *Webster County v. Taylor*, 19 Iowa, 117, 120, and cases cited; *Clark v. Des Moines*, 19 Iowa, 199; *Clark v. Polk County*, 19 Iowa, 248; *School District v. Lombard*, 2 Dillon, 493; *Keller v. Leavenworth Co.* 6 Kansas, 510; *Goodnow v. Ramsey Co.* 11 Minn. 31; *Dillon on Munic. Corp.* sec. 412 and cases cited; *The Mayor of Nashville v. Ray*, 19 Wall. 468, 477. Many more cases might be cited, but it is hardly necessary. The true rule is this:

Shirk v. Pulaski County.

Within the limits of their power, as conferred by statute, the action of the county court, in determining the amount due a creditor of the county, in the absence of fraud, or, perhaps, mistake, binds the county; but the county court cannot bind the county by ordering a claim to be paid, which is not made a county charge by statute, or by allowing more than the statute distinctly limits, or by an allowance in the face of a statutory prohibition.

Any other principle would ruin municipalities and counties; and the danger which would result from it is well exemplified in this case, where ten dollars have been allowed for one, and where, it is said, the officers of the defendant county have in this manner issued \$400,000 of warrants within a few years, which are yet outstanding.

5. This practice having so long obtained, and these warrants having been issued and passed freely into circulation without objection, they are, doubtless, in many cases, in the hands of parties who have received them for value in good faith. Each holder is the equitable assignee of the valid, legal claim of the payee, or of the holder's proportionate share of such claim, where several warrants have been issued therefor, subject to any payments the county may have made to any holder of a warrant representing a portion of such claim.

We have some doubt as to whether the holder of these "five-to-one" or "ten-to-one" warrants can recover on them even thus far, but, under the circumstances, we see no injustice which a recovery to this extent, and subject to these limitations, can work to the county; and it is but just to the present holders of the warrants, who may have taken them in good faith and for value—a result which would have been avoided if the county or the people had promptly stopped, as they ought, *this bad business*.

Wherever the original claimant could have recovered against the county, there is no inconsistency in subrogating the holder of warrants issued for such a claim to the rights of the payee. And such a principle was in reality adopted in *School District v. Lombard*, 2 Dillon, 493, by Mr. Justice MILLER, for there is

Shirk v. Pulaski County.

no substantial difference in the rights of the parties, whether the county files a bill in equity to cancel a warrant for illegality, or is allowed for that reason to make a defence thereto.

A judgment on the demurrer to the answer will be entered, in conformity with these views.

CALDWELL, J., concurs.

JUDGMENT ACCORDINGLY.

NOTE.—The circuit court of the United States for the eastern district of Arkansas, April term, 1876, upon a review of the legislation of that state touching the indebtedness of counties on *warrants*, and the provisions of the new constitution on the subject of county indebtedness, decided the following propositions:

1. That the county court, in case the county is indebted, owes a legal duty to the creditor, or warrant-holder, to exert the power of levying taxes to the maximum limit allowed by law, if necessary, to pay the outstanding indebtedness of the county. The maximum rate can in no event be exceeded. (Dillon on Munic. Corp. sec. 689.)

2. That a creditor, who has obtained a judgment in this court against a county, may, after proper demand on the county court to discharge its duty in this regard, and a neglect or refusal on the part of the court to comply with such demand, have a mandamus to compel the performance of such duty. There must be such a demand, or averment of facts of such a nature as will dispense with the demand.

3. Under the new constitution (art. XVI., sec 9), as to indebtedness then existing, there is a duty, which creditors may enforce, resting on the county court, to levy a tax, not exceeding one-half of one per cent. Such tax, when levied and collected, cannot "be used for any other purpose" than the payment of such indebtedness (art. XVI., sec. 11), and must, according to our present impression, although the court does not hold itself concluded on the point, be collected in money, and not in other warrants. (See *United States, ex rel. etc. v. Miller County, post.*)

Boro v. Phillips County.

BORO v. PHILLIPS COUNTY.

1. A state may impose special assessments on districts for the purpose of building levees, etc., by virtue of its police power; such an assessment is not in conflict with the constitutional provision requiring equal and uniform valuation of all property for purposes of taxation.
2. The general rule of law that "where one takes a benefit from the result of another's labor, he is bound to pay for the same," does not, as against the county, apply to cases where the benefit of the work is immediately to the adjacent property, and only incidental to the county at large.
3. When the county court merely acts as an agent for a district, and by law it is made the duty of the county court to assess a tax on the lands of the levee district to pay for the work, upon a failure or refusal on the part of the county court to discharge its duty in the premises, *mandamus* is the proper remedy, but such failure or refusal will not make the county liable to a *general* judgment for the obligations of the district.
4. The county being divided into several levee districts, each of which is to pay its own obligations for work done within the district, the obligations, although made payable by the levee treasurer of the county, are payable only out of the funds of the district in which the work was done, and cannot be made the foundation of an action against the county for a money judgment.

(Before CALDWELL, J.)

Constitutional Law.—Special Assessment.—Liabilities of Counties and Districts.—Levee Tax.—Levee Bonds.

AN act of the general assembly of this state, approved February 16th, 1859, provided, among things: That the county courts of the counties of Desha and Phillips should divide the overflowed lands in each of said counties into not less than four nor more than seven levee districts; that it should appoint for each levee district three freeholders, residents of the district for which they were appointed, whose duty it was to report to the county clerk a list of all lands in their districts, respectively, subject to overflow. For each levee district one levee inspector was, in the first instance, to be appointed by the county court, and afterwards to be elected by the qualified voters of the dis-

 Boro v. Phillips County.

trict, who was required to give bond to the state of Arkansas, for the use and benefit of the levee district for which he was appointed. The levee inspector for each district assessed the lands therein for levee purposes, the act fixing the minimum value of the land for this purpose at \$10 per acre, and returned his assessment roll to the county clerk, whose duty it was to enter the same on the tax book, and to extend the levee tax against the same at the rate fixed by the county court, which could not be less than one-fourth of one nor more than two per cent annually.

The sheriff of the county collected the taxes thus assessed and levied, and paid the same over to the "levee treasurer of the county," who, in the first instance, was appointed by the county court, and afterwards elected by the qualified voters of the levee districts, whose duty it was to receive and safely keep the levee funds of each levee district, and pay the same out on the order or warrant of the levee inspectors, drawn against the levee fund of their districts respectively.

The levee inspector for each district was invested with large powers, and authorized to make contracts for building and repairing the levees in his district, and payment for such work belonging to his district was to be made out of the fund arising from the levee tax assessed and collected for such district in the manner indicated, and the inspector was authorized, when money was due for levee work in his district, to draw his warrant upon the treasurer for the amount, which the act declared "might be in the following terms, to-wit:

"State of Arkansas, County of ——— :

"The levee treasurer of ——— county will pay to ——— or order the sum of ——— dollars, out of any money in the treasury belonging to levee district No. —, this ——— day of ———, 18—.

"A. B. C.,

"Levee Inspector of Levee District No. —."

By an act approved January 15th, 1861, the first act was amended in several respects, not material to notice, and the fol-

Boro v. Phillips County.

lowing provisions were enacted relating to the levee warrants or scrip theretofore issued by the levee inspectors of the several districts: "SEC. 19. That all the levee bonds, scrip, or drafts issued by the several levee inspectors of said counties prior to the taking effect of this act, shall be presented to the county clerk of the county in which such bonds, scrip, or drafts were issued on or before the 1st day of January, 1862, whose duty it shall be to issue to the holders thereof the same amount of bonds, scrip, or drafts, bearing the same rate of interest, which interest shall run from the date the scrip, bond, or draft bears interest before renewal, *and each bond, scrip, or draft shall be confined to the county and district in which it was issued and out of the fund of which the same is to be paid.*" It was further provided that the county clerk shall keep a register of the scrip presented to him for renewal, showing the date, number, amount, to whom payable, what inspector issued the same, and the number of the district out of the fund of which the same is payable, and shall file the same in his office for the inspection of the county court; and it was provided that levee scrip should be received in payment of levee taxes in the levee district out of the funds of which the same is made payable, and that no lands in the county shall be taxed for levee purposes that were not taxable for that purpose under the first act, *i. e.*, lands subject to overflow, and included in a levee district. Under the provisions of section 19 of the last act, above quoted, the holders presented to the county clerk of the county levee orders or warrants, previously issued by the levee inspectors of the several levee districts in the county, and for each bond, scrip, or draft so presented the clerk issued a renewal bond or draft. A further act, approved April 8th, 1869, gives to the holders of levee scrip or bonds, issued under the previous acts, one year in which to present the same to the county court for payment, filed and numbered, in order to enable the court to estimate the necessary amount to be levied each year upon the land situated in each levee district, as laid off and designated by each of said county courts, and it was made the duty of the county court to levy an annual tax upon all the lands in each of

Boro v. Phillips County.

the districts to pay the levee bonds and scrip of said district respectively. The levee bonds or scrip in suit were presented to the county court and filed and registered as required by this act.

The county court refused or neglected to levy a tax on the lands in the levee districts to pay scrip or bonds, as required by the act of 1869, and no such tax has been assessed or collected since 1862, and no moneys arising from such a tax are now or ever have been in the county treasury or used or appropriated by the county for general county purposes, but all moneys arising from the levee tax on lands, in these districts, were paid out by the levee treasurer on levee bonds, or scrip issued for building and repairing levees in the several districts.

The acts of February 16th, 1859, and January 15th, 1861, were repealed by the act of March 23d, 1871. The plaintiffs are holders of a large amount of the renewal bonds issued by the county clerk, under section 19 of the act of January 15th, 1861, and seek by this action to recover a *general judgment against the county thereon*.

W. H. Hiddell, for the plaintiff.

Tappan & Horner, and *Palmer & Nichols*, for the defendant.

CALDWELL, J.—In seasons of high water, a considerable portion of the finest cotton lands of the south, bordering on the Mississippi and its tributaries, are subject to overflow. The protection of these lands from inundation by the construction of levees was early found to be practicable and necessary to the growth and prosperity of the rich alluvial districts of the southern states. Coeval with organized governments in these states, laws were passed looking to the reclamation of these lands by the construction of levees, and providing a mode in which the money should be raised to pay the same. The usual mode adopted for this purpose was to divide the overflowed lands into convenient districts, appoint local officers therefor, to determine the location of levees, and to contract, on behalf of the district, for their construction and repair, and providing for a special assessment

Boro v. Phillips County.

on the lands benefited by the construction of the levees to pay the cost of the same.

The authority of the state to impose a special assessment for this purpose, on the lands benefited, is found in the police power. A special assessment for such a purpose is not a tax, in the strict legal sense of that word, and hence it has been uniformly held that the usual constitutional provisions requiring the burdens of taxation to be equally distributed, and requiring an equal and uniform valuation of all property for purposes of taxation, have relation to taxation for general state and county purposes, and are not limitations on the exercise of the police power, and do not inhibit special local assessments, when the fund raised is expended for the improvement of the property taxed. (*McGhee v. Mathis*, 21 Ark. 40; *Cooley on Taxation*, pp. 401, 402, 427, and authorities cited.)

The policy of imposing the cost of the construction and repairs of the levees on the lands benefited thereby, was adopted by the legislature in reference to the levees in Desha and Phillips counties. The acts are explicit on that subject. By their terms these lands subject to overflow are divided into districts. Each district has its own officers to contract on behalf of the district for the construction of levees.

Provision is made for raising a fund to pay for all levee work by an assessment on the lands benefited, and it is expressly provided that other lands and property in the county shall not be assessed or taxed for this purpose.

The acts in question adopted a scheme for the construction of levees and raising a fund to pay therefor quite independent of the action of the county proper in its corporate capacity. The contracts for levee work were to be made by the levee inspector of the district, and the work was to be paid for out of the levee fund arising from the assessment made on the lands in the levee district. The warrant or order for such payment was drawn by the levee inspector of the district on the levee treasurer of the county, an officer elected by the qualified voters of the levee districts of the county, and not by the qualified voters of the whole

Boro v. Phillips County.

county, and was payable out of money in his hands belonging to the levee district in which the work was done. The levees that might be built were for the exclusive benefit and advantage of the land reclaimed from overflow, and for this reason the acts in question made provision for the whole cost of the construction upon the lands thus benefited. If this scheme proved inadequate for raising the funds, that does not make the county liable. The act does not provide that the county shall be liable in such an event, or in any event, and the general rule "that when one takes a benefit from the result of another's labor, he is bound to pay for the same," does not apply to cases of this kind, where the benefit arising from the work or improvement is immediately to the adjacent property and only incidentally to the county at large. (*Argenti v. San Francisco*, 16 Cal. 255, opinion by FIELD, C. J.)

The acts impose no liability on the county. Neither the county court nor any officer of the county had any authority or power to enter into a contract, or make or create an obligation binding on the county in relation to the work. It was suggested in the argument that a sufficient authority for the county court to bind the county in such case was found in section 9, article VI., of the constitution of 1836, in force at the date of the transaction, which declares "the county court shall have jurisdiction in every other case necessary to the internal improvements and local concerns of the county."

In 1857 an act was passed providing for the construction of levees in Chicot county, identical in many of its provisions with the acts here in question, and in *McGhee v. Mathis*, *supra*, the supreme court say: "Nor are the levees provided for by act of January 7th, 1857, an 'internal improvement and local concern,' within the meaning of that clause of the constitution above cited. These terms, as there employed, relate to public internal improvements, and local concerns for general county purposes, which appertain to the county at large as a body politic, and not to improvements for special local purposes, where the funds expended in making the improvements are raised by assessments imposed

Boro v. Phillips County.

only on the particular property improved." But in this case the county court has not attempted to make the cost of these levees a charge upon the county, and, if it had done so, its act would have been a nullity. By the terms of these acts, there were but two parties to the contracts to build the contemplated levees — the levee inspector of the district, acting for and in behalf of his district, and the contractor.

The act pointed out specifically the source from whence the fund was to be obtained to pay for such work, and limited the payment to that fund, and the parties must be presumed to have contracted in reference to these provisions of the act. The county was no party to the contract, and no contract or obligation entered into by a district levee inspector could bind the county. What the county court had to do in the premises was to levy such rate of tax within the limits fixed by the act, on the lands in each district as listed, assessed, and reported by the levee inspector thereof, as might appear to be necessary to meet the obligations of the district. The county court was merely resorted to as a convenient and suitable agent for these purposes. If the county court failed or refused to discharge its duty, it might have been compelled by *mandamus*, or other appropriate proceedings at the suit of an aggrieved party, to perform its duty, but the failure of the county court to discharge any or all of the duties imposed on it by these acts would not render the county liable for the debts of the levee districts. If the money arising from the local assessments to pay the debts of the levee districts had gone into the county treasury and been used or appropriated by her for general county purposes, a different question would be presented; but the fact is conceded to be otherwise. The bonds or certificates sued on were issued by the county clerk, and were intended, doubtless, to conform to the requirements of section 19 of the act of January 15th, 1861; if not issued by authority of that section, they are of no validity, because no other authority for their issue can be found.

There is an obvious error in the preamble to these renewal bonds, the clerk reciting that they are issued under and by virtue

Boro v. Phillips County.

of section 11 of the act of February 16th, 1859, when it is apparent that they must have been issued under section 19 of the act of January 15th, 1861. That section expressly provides that each renewal draft issued by the clerk "should be confined to the county and *district* in which it was issued, and out of the fund of which the same is [to be] paid." They were intended to be, and declared to be, "renewals" of the drafts drawn by the levee inspectors of the several levee districts, and, like them, they were made payable in terms out of money in the treasury belonging to the levee district in which the work was done. The bonds in suit declare the "levee treasurer" will pay the sum named therein "in part payment of work done according to contract within and for levee district No. —." They are not in terms payable out of the funds of any particular district, though the district in which the work was done, on account of which the bond is issued, is mentioned, and inasmuch as the act provides the work done in a district shall be paid for out of the funds of that district, it is probable the legal effect of these bonds is the same as if they had been made payable in terms out of the funds of the district liable for their payment. If this is not so, then the bonds on their face are void for non-compliance with the law, and the levee treasurer, though in possession of funds to do so, would not be authorized to pay them. (*Martin v. City and County of San Francisco*, 16 Cal. 285; *Bayerque v. City of San Francisco*, 1 McCall. 175.) And if they are treated as valid instruments, properly issued under the law, then they are payable only out of the funds of the levee district in which the work was done, and cannot be made the foundation of an action against the county. (Dillon on Munic. Cor. sec. 413; *Lake v. Trustees of Williamsburg*, 4 Denio, 520; *McCullough v. Mayor of Brooklyn*, 23 Wend. 458; *Kingsberry v. Pettis County*, 17 Mo. 479; *Campbell v. Polk County*, 49 Mo. 214.)

This act of 1869 removed or postponed the bar of the statute of limitations, changed the mode of assessing the lands in the levee districts for levee purposes, and re-enacted with some emphasis the provisions of the act of 1859, relating to the duty of

United States v. Silverman.

the county court to levy the required tax on the lands in the several levee districts to pay the debts of those districts respectively.

This act is not repugnant to the constitution in any of its provisions, but it does not impose the liabilities of the levee district on the county.

JUDGMENT FOR DEFENDANT.

UNITED STATES, *ex rel.* HEWETT and COOPER, v. FRANK SILVERMAN, County Judge.

1. The execution of writs of *mandamus* issued by the circuit court of the United States cannot be interfered with by the process or judgments of the courts of the state, and such interference is illegal and void.
2. The relators obtained in this court a judgment against a county, and a peremptory writ of *mandamus* issued commanding the respondent, as county judge, to levy a tax to pay such judgment. He obeyed. Subsequently the state court, in a proceeding to which the relators were not parties, set aside the order for the tax levied by the respondent in obedience to the *mandamus*, and directed the respondent to enter an order on his records annulling the levy of the tax. The respondent obeyed. At the relators' instance a rule issued against the respondent to show cause why he should not be attached for contempt: *Held*, that he was in contempt, and liable to be punished therefor.
3. The *order* made in the case is given at the end of the opinion.

(Before DILLON and CALDWELL, JJ.)

Mandamus to Levy Taxes to Pay Judgments against Municipalities.—Writ cannot be Interfered with by the State Courts.—Duty of Obedience.—Power to Punish for Contempt.

A RULE was issued against the respondent, the county judge of Jefferson county, Arkansas, at the instance of the relators, to show cause why he should not be punished for contempt. Shortly, the facts are these: Hewett recovered judgment in this

United States v. Silverman.

court against Jefferson county. The county did not appeal from that judgment. Hewett assigned part of the judgment to Cooper. This court awarded a peremptory writ of mandamus to compel the county authorities to levy a tax to pay the judgment. The tax was levied and afterward set aside, under the circumstances hereinafter stated. On a showing that the peremptory writ had not been obeyed, a rule was issued by this court against the county judge of Jefferson county, the Hon. Frank Silverman, to show cause why he should not be punished for contempt in not obeying the writ of mandamus directed to him by this court. He set up in his defence that he obeyed certain orders of the state court hereinafter referred to, and disclaimed any intention to disobey the mandates of this court. The respondent, after the service of the rule upon him, entered an order setting aside the order vacating the levy, and restoring the levy made under the writ of mandamus.

The following opinion, orally given, accompanied the order of the court made in the premises.

Mr. Brown, for the relators.

Mr. Yonley, for the respondent.

DILLON, *Circuit Judge*.—The county officers, on the alternative writ which issued, had full opportunity to be heard against the demands that were made against them. No sufficient reason was shown by the county or its officers why the peremptory writ of mandamus should not issue, and the court adjudged that it ought to be awarded. If the court erred in originally rendering the judgment, the county had a remedy on writ of error in the supreme court of the United States. So, if this court erred in the proceedings had on the alternative writ, or in granting the peremptory writ, the county had its remedy by taking a writ of error to the supreme court of the United States; but its officers pursued no such course, and therefore they should have rendered obedience to the peremptory writ.

The peremptory writ was directed to Frank Silverman, county

United States v. Silverman.

judge, and Craig and others, justices of the peace, composing the county court of Jefferson county. It commanded them "to meet and convene together at the court-house in the town of Pine Bluff, in said county, upon the day fixed by law for levying taxes for county purposes for the year 1877, then and there to organize, open, and hold a county court of said county, and to levy the tax of five mills on the dollar of all the taxable property of said county, provided for by the constitution of the state of Arkansas, for the payment of indebtedness contracted and created before and existing at the time of the ratification of this constitution, payable only in United States currency, and cause the same to be collected at the same time and in the same manner that other county taxes are directed by law to be collected, and to cause the proceeds of the said tax, as soon as collected, to be paid into the registry of our said circuit court, for the payment and satisfaction of the said judgment, interest, and costs."

It appears that this writ was duly served, and that, in pursuance of this command, they did meet and levy the tax which the writ commanded them to cause to be levied.

Afterwards, at the instance of certain tax-payers of that county, a proceeding upon *certiorari* was instituted to have the order of the county court made in obedience to this writ reviewed by the circuit court of the county; and that proceeding was begun and carried on in the local court without any notice being given to the relators or parties interested in the judgment, and in that proceeding the state circuit court undertook to annul the order of the county court made in obedience to the command of this court, and certified its action to the county court in that regard. When that action was certified to the county court, commanding that court to enter an order annulling its prior levy of taxes, the county court obeyed and caused that order to be made. The tax had been extended on the tax books of the county, and the warrant for collection was in the hands of the sheriff, who, by the statutes of this state, is *ex-officio* collector. When it was known in the community that the circuit court of the county had made such order, the collector makes return

United States v. Silverman.

(in obedience to a rule issued upon him) that, although he demanded the tax, he was unable to collect it; that the tax-payers refused to pay it, and so, practically, the command contained in the writ we issued has been of no avail.

In the state of Iowa, some years since, we had a conflict between the state and federal judicial tribunals concerning the validity of bonds issued by municipalities to aid in the construction of railroads. The supreme court of that state held that those bonds were unconstitutional, having, however, previously decided otherwise; and under the first decision a large number of such bonds had been issued. The state supreme court afterwards changed their judgment, and held the bonds to be invalid, and proceedings were begun by tax-payers in the courts of that state to enjoin the counties from levying any tax to pay judgments rendered in the federal courts on municipal bonds.

The leading case in the supreme court of the United States upon this subject, which is well known to the profession, is the case of *Riggs v. Johnson County*, 6 Wall. 166. The case is not so strong for the relators as the one now at the bar, because in that case the injunction from the state court against the officers of Johnson county was issued *before* the writ of mandamus was issued by the federal court. The following is a correct synopsis of the point ruled in that case: "After a return unsatisfied of an execution on a judgment in a circuit court of the United States against a county for interest on railroad bonds, issued under a state statute in force prior to the issue of the bonds, and which made the levy of a tax to pay such interest obligatory on the county, a mandamus from the circuit court of the United States will lie against the county officers to levy a tax, even although *prior* to the application for the mandamus a *state* court has perpetually enjoined the same officers against making such levy; the mandamus, when so issued, being regarded as a writ necessary to the jurisdiction of the federal court which had previously attached, and to enforce its judgments, and the state court, therefore, not being regarded as in prior possession of the case."

United States v. Silverman.

Now, the state officers in the state of Iowa supposed they were between two fires. First, the state court enjoined them from levying the tax, and a subsequent mandamus from the federal court commanded them to levy precisely the same tax which the writ of the state court forbade. If they obeyed the mandamus of the federal court, and levied the tax, the state court would, they said, arrest them for contempt of its writ and punish them. If they disregarded the command of the writ of mandamus, the federal court would attach them for contempt and punish them. Now, what was to be done?

It was this dilemma the county judge, in the case at bar, said he supposed he was in: "I am subject to two commands; the federal court commands the levying of this tax, and the circuit court for the county has commanded me to annul the levy." He obeyed the orders of the local court, and in so doing he simply obeyed the wrong tribunal.

The subject is very fully considered by the supreme court of the United States in the above mentioned case of *Riggs v. Johnson County*. It would consume too much time to refer to it at length; but the effect of it is, that in judgments rendered in this class of cases the writ of mandamus is a writ necessary to enforce the judgment, and that judgment can no more be interfered with by the state courts than they can undertake to interfere with an ordinary writ of execution in the hands of the marshal of this court, nor can the state court any more interfere than the federal court could interfere with their judgments or process. It is a rule that one court shall not interfere with the processes of the other, and when this rule is observed harmony exists in both, and there can be no conflict.

[After reading some extracts from that case, the judge continued.]

Such is the law of the land, as declared by the highest tribunal of the country, and all courts, federal and state, must accept it and yield obedience to it.

It is so understood in this state, for I have before me an opinion of the supreme court of Arkansas, delivered by the present

United States v. Silverman.

distinguished chief justice, in which he considers this subject (*Vance v. Little Rock*, 30 Ark. 435, 452). Speaking on this point, Chief Justice ENGLISH says: "We cannot undertake to say that the circuit court of the United States had not jurisdiction to award the mandamus, nor that in exercising its jurisdiction it committed an error, for this court has no appellate jurisdiction over that court. The city had the right to appeal from its judgment awarding the mandamus to the supreme court of the United States, and failing to do this, no complaint it can make to us of the effect of the judgment awarding the writ can be made of any avail."

That is the true doctrine, and it is the one recognized alike by the supreme court of the state and the supreme court of the United States.

The effect of this is, that the action of the circuit court of Jefferson county, and the action of the county court in pursuance thereof, were nullities.

The county judge has been examined on oath, and he disclaims any intention to disregard the mandate of this court, but he has made a mistake which may result to the prejudice of the relator's interests. We will reserve any further action against the county judge, in order to see whether his action shall in the end result injuriously to the parties.

Judge CALDWELL concurs in the foregoing views, and in the following order:

"*It is now ordered* that the said rule against said Silverman be reserved for the further action of the court, and that John M. Clayton, sheriff and *ex-officio* collector of said county, do proceed to collect the taxes levied to pay the relator's judgment the same as if the said *certiorari* proceedings had not been had, and the judgment and orders of the circuit court, and of the county court setting aside said levy, had not been made. The said collector will collect the said tax as other delinquent taxes are collected, but without penalty upon all such taxes which may be paid before the day when, by law, he is required to advertise real estate for sale for such delinquent tax.

In re Goodrich.

"It is further ordered that a duly certified copy of this order shall forthwith be served by the marshal on said collector."

ORDERED ACCORDINGLY.

In re GOODRICH, Clerk.

1. The one per cent commission allowed to the clerk, "for receiving, keeping, and paying out money, in pursuance of any statute or order of court" (Rev. Stats. sec. 828), implies that the money shall be actually received, kept, and paid out by him, and is his compensation for such services.
2. The clerk is not, at least in general, entitled to such commission on moneys which, although ordered to be, are not, in fact, paid into his hands.
3. A party adjudged to pay money, may pay it to the party entitled, or his attorney of record, and the clerk or registrar will not, in such case, be entitled to commission or poundage; but if he pays to the clerk, *he* does the act which entitles the clerk to his commissions, and must, as a rule, pay the same, and the amount cannot be taxed against the other party. (See *Upton v. Tribblecock*, note.)

(*Before DILLON, Circuit Judge.*)

Revised Statutes, Sec. 828, in Respect of Commission to Clerk on Moneys Paid into Court, Construed.—When Clerk Entitled to Commission.—Who Liable to Pay the same.

CERTAIN questions as to the right of the clerk to commissions on money ordered to be paid into court, and as to the party liable to pay such commissions, were submitted on the following agreed case:

"Several writs of mandamus have issued from this court against the city of Little Rock, in favor of different parties, commanding the city to levy a certain tax for the purpose of paying off the judgments upon which the writs of mandamus were issued, and ordering that, when the tax so levied shall have

In re Goodrich.

been collected, the same shall be paid into the *registry* of this court, for the purpose of satisfying the judgments and costs.

"It is the practice here, in conformity to the mode adopted in the district court, that when said money is paid into the registry the clerk shall execute to the proper city or county officers receipts for the same, showing how the same has been applied and apportioned among the creditors, with separate statements of credits and costs.

"In the cases against the city of Little Rock, the attorneys for the plaintiffs have refused to allow the taxes so collected in obedience to the writs of mandamus to be paid into the registry, and have caused the city officers holding the same to pay the amounts to them as attorneys for plaintiffs, and refuse to pay or allow the clerk's poundage, or commission of one per cent, which he claims under section 828 of the Revised Statutes of the United States. We agree to submit the following propositions to the circuit judge, the district judge declining to act:

"*First.* Whether, when the writ of mandamus commands that the money collected under it shall be paid into the registry of the court, the city or county officer holding the same can pay it to the attorneys for the plaintiffs, instead of into the registry of the court.

"*Second.* Whether, when money is paid to the plaintiffs' attorneys, collected on mandamus which commands said money to be paid into the registry, the clerk is entitled to his poundage or commission.

"*Third.* Whether the plaintiffs or defendants are liable for clerk's poundage, where money is paid into the registry.

"B. S. JOHNSON, *City Attorney.*

"U. M. ROSE, *for Creditors.*

"RALPH L. GOODRICH, *Clerk, pro se.*"

U. M. Rose, Gallagher & Newton, and Geo. L. Basham, for the creditors.

We submit that the plaintiff cannot have any costs to pay in collecting a judgment. The commissions of the clerk are like

In re Goodrich.

the commissions of the marshal when he collects the money, and they should be taxed as part of the costs in the case.

DILLON, *Circuit Judge*.—"For receiving, keeping, and paying out money, in pursuance of any statute or order of court," the clerk is entitled to "one per centum on the amount so received, kept, and paid." (Rev. Stats. sec. 828.)

The one per cent thus allowed is for compensation to the clerk for the trouble and responsibility of actually receiving, keeping, and paying out money.

On the facts submitted, I am of opinion that the clerk is not entitled to a commission on moneys which, although ordered to be, were not, in fact, paid to him under the writs of mandamus.

If a party adjudged to pay money, instead of paying it to the party entitled, or his attorney of record, elects to pay the same to the clerk, he does the act which entitles the clerk to his commission for receiving, keeping, and paying out the money, and he must pay the commission allowed to the clerk therefor, and the same cannot be taxed against the other party, as was held by Mr. Justice MILLER, in *Upton v. Triplecock*. (See note.) That case, in principle, covers the case submitted to me. The claim of the clerk is disallowed. There are no equitable circumstances presented in this case to vary the general rule.

ORDERED ACCORDINGLY.

NOTE.—*Upton v. Triplecock*.—The case was thus: Judgments were rendered against defendants, and by stipulation of parties, all the judgments were to be satisfied upon the payment of \$18,000, in three equal installments, "to the clerk of the circuit court of the United States, at Des Moines."

Under this stipulation defendants paid to the clerk \$6,000, the first installment, from which the clerk deducted one per cent, his commission for receiving, keeping, and paying out the money. Plaintiff only gave credit for the amount received by him from the clerk, to-wit: the sum of \$5,940.

The other installments were paid, as they became due, to the plaintiff's attorneys of record, and upon final payment plaintiff claimed that defendants should pay the \$60 deducted by the clerk. The defendants denied their liability to pay the same.

United States v. Miller County.

The question was submitted to Mr. Justice MILLER, who decided that defendants, notwithstanding the stipulation to pay to the clerk, were at liberty to pay to the plaintiff, or the plaintiff's attorneys of record, and take their receipt therefor, and that in the event of such payment the clerk would not be entitled to the commission of one per cent, but the defendants, having of their own election paid the \$6,000 to the clerk, were liable for the clerk's commission of one per cent on the \$6,000; and he held that the defendants must pay the clerk's poundage (\$60) on the sum which they actually paid into the clerk, but were not liable for poundage on any other part of the amount of the judgment.

UNITED STATES, *ex rel.* CARHART, v. MILLER COUNTY.

1. Payment of judgments rendered on ordinary warrants issued by counties in Arkansas, can only be enforced in the manner provided by the constitution and laws of the state.
2. The present constitution of the state, as to the rights and remedy of the holder of such warrants, distinguishes between those issued before and those issued after its adoption.
3. A relator, whose judgment is based on county warrants issued *after* the adoption of the present constitution, is not entitled to the levy of a tax to pay such judgment in excess of the constitutional limitation, nor to have part of the general tax specially appropriated and set aside to pay such judgment. *Aliter*, as to judgments on negotiable bonds issued under acts which require or authorize the levy of a special tax to pay them, and as to judgments upon warrants issued *prior* to the adoption of the present constitution of the state.

(Before DILLON and CALDWELL, JJ.)

County Warrants in Arkansas.—Rights of Judgment Creditor.—Mode of Enforcing Judgment.—Provisions of the Constitution of Arkansas of 1874 in Respect to Municipal and County Indebtedness, Construed.

ON the 28th day of October, 1876, the relator recovered in this court a judgment against Miller county, for the sum of \$7,267.52 and costs of suit. This judgment was recovered on ordinary county warrants, issued for the ordinary expenditures

United States v. Miller County.

of the county *accruing since* the date of the adoption of the present constitution. Article XVI. of the present constitution of the state, which went into effect on the 30th day of October, 1874, contains these provisions:

"SEC. 9. No county shall levy a tax to exceed *one-half of one per cent for all purposes*; but may levy an additional one-half of one per cent to pay indebtedness existing at the time of the ratification of this constitution.

"SEC. 10. The taxes of counties, towns, and cities shall only be payable in lawful currency of the United States, or the orders or warrants of said counties, towns, and cities respectively.

"SEC. 11. No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; and no moneys arising from a tax levied for one purpose shall be used for any other purpose."

The revenue act of the state declares that it shall be unlawful for the county court to levy, "for all general county purposes," a rate exceeding five mills. (Section 3, act March 5th, 1875, p. 223.) By an act approved December 14th, 1875, it is provided "that all county warrants and county scrip shall be receivable for any taxes for county purposes," with this limitation only, that the collector shall not "receive scrip issued since the adoption of the constitution in payment of the tax levied to pay the indebtedness existing before the adoption of the constitution."

The relator sued out an alternative writ of *mandamus*, requiring the county court to show cause why it should not levy a tax of five mills on the dollar on the taxable property of the county, payable in currency, and apply the same, or such portion thereof as this court may direct, towards the payment of the relator's judgment.

To this writ the county court returns, in substance, that the relator's judgment was recovered on ordinary county warrants, issued for the ordinary expenditures of the county accruing since the 30th day of October, 1874; that each and every year since the said warrants were issued, including the current year, the county court has levied on all the taxable property of the county,

United States v. Miller County.

for "general county purposes" (which are set out in detail), a tax of five mills on the dollar; that the revenue derived from said levies has not in any of said years been sufficient to pay the ordinary current expenses of the county for the year; that the like rate of tax for ordinary county purposes will be levied for the year 1878, and each year thereafter; that such levies will be in the future, as they have been in the past, inadequate to defray the necessary current expenses of the county.

The case is before the court on a demurrer to this return.

E. W. Kimball, for the relator.

J. M. Moore, for the county.

CALDWELL, J.—No court, state or federal, can by *mandamus* compel the levy of a tax not authorized by some law of the state applicable to the case. (*Supervisors v. United States*, 18 Wall. 71; *Burroughs on Taxation*, sec. 91; *United States, ex rel. Ranger, v. City of New Orleans*, 2 Woods, 230; *Vance v. City of Little Rock*, 30 Ark. 435; *United States v. County of Clark*, 5 Otto, [95 U. S. R.] 769.)

In the last case cited, the court say: "It need not be said that no court will, by *mandamus*, compel county officers of a state to do what they are not authorized to do by the laws of the state. A *mandamus* does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing when its exercise is a duty."

The counsel for the relator does not question the soundness of this proposition, and does not ask the court to require the county to levy a rate in excess of five mills, but insists that it should require the levy of that rate and the application of all or some portion of it to the payment of the relator's judgment.

Except to pay debts contracted before its adoption, the constitution of this state limits the rate of taxation that may be imposed by a county "for all purposes" to five mills on the dollar, and provides that such tax may be paid in lawful currency, or the orders or the warrants of the county; and these constitu-

United States v. Miller County.

tional provisions are supplemented by acts of the legislature declaring it to be unlawful for the county court to levy "for all general county purposes" a rate exceeding five mills, and declaring that all county warrants shall be receivable for all county taxes, except those levied to pay debts existing *before* the adoption of the constitution.

No power is given to levy a *special* tax to pay the class of warrants upon which the relator's judgment was rendered, and no special authority is given to appropriate or apportion any part of the five mill tax that may be levied to the payment of such warrants or judgments recovered thereon.

This was the law when the warrants were issued upon which the relator's judgment was rendered. The relator knew this to be the law when he received the warrants, and must have known that if the ordinary expenses of the county exceeded the revenue derived from the tax the county was authorized to levy, the warrants could not be discharged in money, and were only valuable as a legal tender in payment of all county taxes, with the exception mentioned.

If this court could require the county to set apart any portion of the five mills the county is authorized to levy, and require such portion to be collected in currency to pay the relator's judgment, it could appropriate the whole levy for that purpose, and require all of it to be collected in currency. The constitution and laws of the state forbid that this should be done. It would be an infringement upon the constitutional right that every holder of like warrants has to pay his county taxes in such warrants, and would be a violation of the whole theory and policy of the constitution of the state in relation to the conduct and administration of county affairs under that instrument.

It is impossible to distinguish this case from the case of the *Supervisors v. United States*, 18 Wall. 71. Mr. Justice STRONG, in delivering the opinion of the court in that case, says: "In this case, the warrants upon which the relator's judgment was obtained were all ordinary warrants, drawn upon the treasurer of the county, and, as is admitted by the demurrer, drawn for the

United States v. Miller County.

ordinary expenses of the county; they were such instruments as the legislature contemplated might be employed in conducting the current and usual business of the county. The act which empowers the county board to levy a tax for ordinary county revenue speaks of them, and evidently intends that they shall be satisfied, either from the proceeds of that tax or by their being received in payment thereof. They are simply a means of anticipating ordinary revenue."

And the court held, in that case, that, under the laws of Iowa, which are, so far as relates to ordinary county warrants as construed by her courts, in legal effect identical with the laws of this state, the county could not be required to levy a special tax to pay such warrants. In its practical results, there is no difference between a special tax and the special appropriation of the whole or a part of a general tax for a particular purpose. Neither can be done in the absence of a law sanctioning it.

The relator does not suggest that there is any money in the treasury applicable to the payment of the warrants on which his judgment was rendered, or that the levy of the maximum rate of county taxes will result in placing funds applicable to this purpose in the treasury, and the fact is conceded to be otherwise, for the county tax each year is paid in the warrants of the county, leaving at the end of each year large amounts of warrants outstanding.

This case must not be confounded with the case of judgments on negotiable bonds issued by counties prior to the adoption of the present constitution, under authority of acts of the legislature, which authorize and require the levy of a special tax, or of a tax sufficient in amount to pay interest on such bonds, and the bonds themselves at maturity; nor with the case of judgments on county warrants issued prior to the adoption of the present constitution.

In the case of bond judgments, the authority and duty of the county court to levy a tax to pay them are found in the law authorizing their issue; and in the case of judgments rendered on warrants issued prior to the adoption of the present constitu-

United States v. Miller County.

tion, the right to levy a tax of five mills to pay them is found in the last clause of section 9 of article XVI. of the constitution. But the laws applicable in the case last mentioned have no application to the relator's judgment, which was rendered on warrants issued subsequent to the adoption of the present constitution, and must be governed by it and laws passed under it.

The demurrer to the return to the alternative writ is overruled, and the peremptory writ refused.

DILLON, J., concurs.

JUDGMENT ACCORDINGLY.

NOTE.—In the *United States, ex rel. Merchants' National Bank, v. Jefferson County*, April term, 1878, the relators having recovered judgment on negotiable bonds issued under the act of April 29, 1873, which required the "levy of a special tax" to pay them, CALDWELL, J., in an exhaustive opinion, reviewing the cases, decided the following propositions as applicable to all judgments on negotiable bonds issued prior to the adoption of the constitution of 1874, under acts requiring the levy of a sufficient tax to pay the same :

1. Where a statute authorizes a county to issue its negotiable bonds, and makes it the duty of the county court "to levy a special tax of sufficient amount to pay the interest and principal of said bonds, as the same become due," the power of taxation, thus given, enters into and becomes a part of the obligation of the contract between the county and every holder of such bonds; and, under the constitution of the United States, this obligation of the contract cannot be impaired or lessened in any degree by the constitution or laws of the state afterward enacted.

2. In such case, it is the duty of the county court to levy, and cause to be collected, a tax sufficient in amount to pay the interest and principal of such bonds as the same mature, and if it does not perform this duty, it may be compelled to do so by mandamus.

3. The restriction on the taxing power of counties contained in the constitution of 1874, does not repeal or impair the provisions of prior laws under which bonds were issued requiring the levy of a special tax to pay the interest and principal of such bonds, as they become due.

REPORTS OF CASES DETERMINED
IN THE
District Court of the United States,
FOR THE
WESTERN DISTRICT OF ARKANSAS.*

CULVER *et al.* v. COUNTY OF CRAWFORD.

1. To give the circuit court jurisdiction, the matter in dispute must exceed, exclusive of costs, the sum of \$500, and, in actions upon a money demand, the court, in passing on the question of jurisdiction, will look to the amount stated in the body of the complaint, and will not be governed alone by the amount in the prayer for judgment.
2. In a suit seeking to recover an amount that is not fixed, and which amount can be ascertained only by trial, the plaintiff can obtain a standing in court by laying his damages at the requisite sum.

(Before PARKER, J.)

Jurisdiction of United States Circuit Courts.—Amount in Dispute.

THIS case is fully stated in the opinion of the court.

Yonley & Whipple, for the plaintiffs.

Hugh F. Thomason, for the defendants.

PARKER, J.—The complaint in this case contains four counts, each one being based upon a written promise of the county to pay a sum of money therein specified, such promise in writing

* The district court for the western district of Arkansas has circuit court powers.

Culver v. Crawford County.

being what is commonly called and known as county scrip, or a county warrant. The warrants sued on are set out in the several counts in *hæc verba*. From these warrants, so set out and made a part of the complaint, it appears that the whole amount which the plaintiffs could recover would be less than five hundred dollars. The plaintiffs pray judgment for six hundred dollars. The defendant files a motion to dismiss the suit, for the reason "that it appears upon the face of the complaint that the sum in controversy does not exceed the sum or value of five hundred dollars."

The plaintiff claims in argument that the jurisdiction of the United States circuit court, as to the subject matter of the suit, is fixed by the amount claimed in the prayer of the complaint. Section 1 of the act of the 3d of March, 1875, provides "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars;" and, of course, when the action is between certain parties therein named. The question presented in this case is: How is the sum or matter in dispute to be ascertained?—by going to the whole complaint, or to the prayer alone?

The sum or matter in dispute must exceed, exclusive of costs, the sum of five hundred dollars. There are no very recent decisions bearing directly upon the point in controversy in this case. We find, however, that the law regulating the removal of causes from state courts to federal courts, has a provision in regard to the amount in controversy, in the precise language of the one set out above. Judge DILLON, in his "Removal of Causes from State Courts to Federal Courts," while treating of the law in regard to removal of causes, page 24, says: "The value of the matter in dispute for the purposes of removal is to be determined by reference to the amount claimed in the declaration, petition, or bill of complaint. In actions on a money demand, the value in dispute is the debt and damages claimed, as stated in the petition or declaration, and in the prayer for judg-

Culver v. Crawford County.

ment. For example, if the action be on a note for a fixed sum, and the principal and interest and damages do not altogether exceed five hundred dollars, it is not removable, although the prayer for judgment may be for an amount greater than five hundred dollars." The prayer for relief is generally regarded as forming no part of the cause of action, and as having no effect upon it, and as furnishing no test or criterion by which its nature may be determined. (Pomeroy, Remedies and Remedial Rights, p. 630, sec. 580.)

This is either true or false. If it is true, a court of limited jurisdiction must go to the statement of the cause of action contained in material parts of the complaint or declaration, in a case where a suit is upon a money demand or fixed amount. If it is not true, then the prayer is bad, because it is inconsistent with the other parts of the complaint or declaration. If it is bad, it is surely a very uncertain test from which to ascertain jurisdiction. Of course, in a suit for unascertained damages, the only test of the amount in dispute is found in the prayer for relief. But, under the rules of pleading, the plaintiff, when he sues upon a money demand, if it be on a written promise to pay, or an account, must at least set out the substance of his written promise or his account in his complaint, and must make such written promise or account a part of his pleading. Then, in that case, there is no trouble in ascertaining the true amount in controversy, by looking at the body of the complaint. In the case of *Judson v. Macon County*, 2 Dillon, 213, the same being a suit upon coupons of a county, Judge DILLON evidently went to the whole complaint to ascertain the total amount in controversy. It is true that the jurisdiction is not to be determined by the amount of the judgment recovered. By matter in dispute is meant the subject of litigation—the matter for which the suit is brought and on which issue is joined. In an action on a money demand, the matter in dispute is the debt claimed; and its amount as stated in the body of the complaint, and not merely the damages alleged in the prayer for judgment

Connor v. Scott.

at its conclusion, must be considered in determining the question whether the court can take jurisdiction.

In the section of the law regulating the appellate jurisdiction of the supreme court of the United States, it is provided that the matter in dispute shall exceed the sum of (now) five thousand dollars. Upon a statute similar to this, it was held by the supreme court, in *Lee v. Watson*, 1 Wall. 337, that "the matter in dispute, in an action upon a money demand, is the debt claimed and its amount as stated in the body of the declaration, and not merely the damages alleged in the statement, in the prayer for judgment at its conclusion." The same rule is found in Abbott's United States Practice, vol. 1, p. 336; Phillips's Practice, p. 78; Conkling's Treatise, p. 132.

In this case, the amount is a sum certain fixed by contract, which the plaintiff is obliged to set forth, and from which it may be seen that the sum sued for is less than the requisite sum to give this court jurisdiction. In such a case the court, in determining a matter of so much importance as its jurisdiction, must look to the whole complaint, and not to the prayer alone.

In a suit to recover an amount that is not fixed, and which amount can be ascertained only by trial, the plaintiff can obtain a standing in court by laying his damages at the requisite sum.

MOTION SUSTAINED.

CONNOR v. SCOTT.

1. To a bill filed in a state court to enforce a vendor's lien, the defendant set up a sale of the land in question to him, by the assignee in bankruptcy of one C, the maker of the notes constituting the lien, and filed his petition for the removal of the cause to the United States court: *Held*, that this involves the construction of the bankrupt law, and is therefore properly removable; and it does not alter the case that there are other questions of law to be settled, which depend on general principles, and not on the laws of congress.

Connor v. Scott.

2. The petition, under the act of 1875, is not required to be sworn to.
3. The mere filing of the petition and bond removes the cause *ipso facto*, if the cause is removable and the petition and bond are filed in due time and are in due form.

(Before PARKER, J.)

Removal of Causes.—Practice.—Effect of Filing Petition and Bond.

THIS is an action brought in the circuit court of the state of Arkansas, in Little River county, to enforce a vendor's lien upon land in the possession of defendant Scott, arising upon two notes, amounting to upwards of \$20,000, executed by James M. Carr to Benjamin F. Ryburn, for the purchase money of the tract of land sued for. George S. Scott claims the land by virtue of a deed from John Wassell, assignee of James M. Carr in bankruptcy. On the 20th day of July, 1875, the defendant Scott filed his petition in open court for the removal of the cause to the district court of the United States for the western district of Arkansas, on the grounds that his defence to said action arises under the laws of the United States, and by and through the force of the bankrupt law. This petition, on motion of plaintiffs' attorneys, was stricken from the files of the circuit court, and, on the 21st day of July, 1875, the defendant filed his amended petition for removal to the federal court. On the 20th day of July, 1875, a bond was filed by defendant Scott, as is required by the act of congress of the 3d day of March, 1875. The plaintiffs, by their attorneys, filed a motion to strike out and remove from the files of the Little River circuit court this amended petition, for the following reasons: "Said pretended petition was not sworn to; that such pretended petition does not show sufficient grounds for such transfer; that the petition shows on its face that this is not a case falling within the act of congress; that said pretended petition is evasive, and does not clearly state any reasons for removing this cause without the jurisdiction of this court."

This motion was sustained, and the defendant Scott then

Connor v. Scott.

obtained a transcript of the petition and answer filed in the above entitled cause, and filed the same in the district court for the western district of Arkansas, on the first day of the November term, 1875. Whereupon the plaintiffs, by their attorneys, appeared and filed their motion to strike from the docket this cause, for the following reasons: "That this court has no jurisdiction herein. The pretended transfer of said cause has not been made according to law. The case was docketed herein without the order of any court; and the proceedings are irregular, informal, and without the authority of any law."

PARKER, J.—Two questions arise here. The first is, taking them in the order of these proceedings, did the defendant Scott comply with the requirements of the law of congress of the 3d day of March, 1875, in making his application for a removal of a cause from a state court to a federal court? And, second, does the court have jurisdiction of the cause after it gets here?

On the first question, I am of the opinion that the petition for the removal of the cause is in the form required by the act of congress of March 3d, 1875; that, under said act, it need not, in a case of this kind, be sworn to, and that the bond filed in the case is such a bond as is required by said act of congress. The petition and bond being such as are required by law, the mere filing of the petition and bond *ipso facto* removes the cause, and it is not necessary for the state court to act on the application. This view of the law, I think, is sustained in *Osgood v. The Chicago and Vincennes Railroad Company*; *First National Bank of Manhattan v. King Wrought Iron Bridge Company*, decided by Mr. Justice MILLER, and a decision of Mr. Circuit Judge McKEERNAN, in the United States circuit court for the eastern district of Pennsylvania, all of which are reported in the Central Law Journal. The supreme court of Missouri, in the case of *Hennigford v. The Elma Insurance Company*, 42 Mo. 151-155, say that "when a party makes an application for a removal of the cause in the manner required by the act of congress, it is error in the state court to proceed further in the

Connor v. Scott.

matter, and any subsequent step is *coram non judice*." Mr. Circuit Judge JOHNSTON, while sitting in the circuit court for the southern district of New York, in the case of the *Merchants' and Manufacturers' National Bank v. Wheeler*, held that the rule was well settled that the application, if sufficient by law, is effectual to remove the cause, however it may be disposed of by the state court.

I am of the opinion, on the first point in the case, that the defendant Scott complied with the law of congress in making his application for removal of the cause from a state to a federal court; and the state court, when the petition and bond were filed, should have gone no further, but should have ordered the clerk to send a transcript of the case to the federal court, leaving to that tribunal the decision of the question as to whether it was such a case as, under the laws of the United States, was within the jurisdiction of the federal courts.

The next question is, does this court have jurisdiction of this action? The field of jurisdiction is a wide one, and one in which there are frequently to be found many difficulties in the way of a correct solution of the question.

The question involves the relative powers of the two systems of courts, which are a part of our duplex system of government. The source of jurisdiction in the federal courts is the second section of the third article of the constitution of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause; in the second, the jurisdiction depends entirely on the character of the parties.

The first class comprehends all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. This is the language of the constitution. It will be observed that the part of the second section of the act of congress of the 3d of March, 1875, which provides for the removal of a certain class of causes, dependent upon the subject matter of the same, is identical in meaning with the clause of the second section of the

Connor v. Scott.

third article of the constitution, which gives jurisdiction to federal courts over a certain class of cases, dependent upon their subject matter. Then, if this part of the constitution has received a construction, it may be used as a correct rule of interpretation, and applied to the second section of the removal act.

This section goes further than any act of removal heretofore passed has done. It goes as far as it can go and keep within the purview of the constitution. It provides that the courts created by the constitution of the United States shall have jurisdiction of any case which, under that constitution, might be brought in the federal courts, although such case may regularly be commenced in the court of a state, provided either party to the suit desires to avail himself of the constitutional privilege of trying his case in the federal court.

What is meant by a suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States? A case is a suit in law or equity, instituted according to a regular course of judicial proceedings. If a case is a suit, then a suit is a case, and the meaning of the second section of the third article of the constitution, and the second section of the removal act, is the same, and when such case or suit involves any question arising under the constitution, treaties, or laws of the United States, it is within the judicial power committed to the courts of the Union. (Marshall's speech, 5 Wheaton, app. 16, 17; *Osborn v. Bank of United States*, 9 Wheaton, 819; 1 Tucker's Blackstone Com. 418-420; Madison's Virginia Resolutions and Report, January, 1800, p. 28; *Marbury v. Madison*, 1 Cra. 137, 173, 174; *Owing v. Norwood*, 5 Cra. 344; 2 Elliott's Debates, 418, 419; *Martin v. Hunter*, 1 Wheaton, 304; *Cohens v. Virginia*, 6 Wheaton, 264, 378, 392; Story's Const. secs. 1647, 1656.) A suit or case consists of the right of one party, as well as the other. (*Cohens v. Virginia*, 6 Wheaton, 379.)

Chief Justice MARSHALL, in the case of *Cohens v. Virginia*, 6 Wheaton, 379, said a case arises, under the constitution or laws of the United States, whenever its correct decision depends on the

Connor v. Scott.

construction of either, or when it involves any question arising under the constitution, treaties, or laws of the United States.

If, therefore, it be true that the second section of the removal act is co-extensive with the judicial power of the federal government, as to the class of cases therein specified, whenever a case is brought in a state court where the matter in dispute exceeds five hundred dollars, exclusive of costs, the correct decision of which depends on the construction of either the constitution or a law of congress, or where it involves any question arising under the constitution, treaties, or laws of congress, the same can be removed to a federal court, provided the machinery for the removal, as prescribed in the act of the 3d of March, 1875, is properly set in motion.

It matters not that other questions may arise in the case, which depend on the general principles of the law, and not on the laws of congress. Chief Justice MARSHALL, in *Osborn v. Bank of the United States*, 9 Wheaton, 256, says: "If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case involving the construction of a law would be withdrawn, and a clause in the constitution relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case every part of which depends on the constitution, laws, or treaties of the United States." Further on, in the same case, he says: "We think, then, that when a question to which the judicial power of the courts of the Union is extended by the constitution forms an ingredient in the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

Does the correct decision of this case depend on the construction of a law of congress? Or does the case involve any question arising under a law of the United States?

The plaintiffs state in their petition, among other things, that defendant Carr, in the year 1868, upon his own application, was declared a bankrupt by the district court for the eastern district

Connor v. Scott.

of Arkansas, and that the lands in controversy were set out in his schedule of assets filed by him as charged with the encumbrance of the two notes mentioned in the petition; that said lands were, by the order of said court, sold by Wassell, the assignee, to defendant Scott, subject to the lien of the two notes. The answer of said Scott admits the bankruptcy of Carr, the sale of the lands by the assignee mentioned in the petition, and the purchase by himself of said lands at the sale, but denies that he purchased said lands subject to any lien arising out of two promissory notes held by Connor and Hawkins; that Carr obtained a full and complete discharge from all his debts and liabilities; that said notes were not a lien upon said lands, and that they were not proven up against the estate of Carr.

Suppose these notes were an equitable lien upon the land named, how are we to ascertain the effect of Carr's bankruptcy upon this lien but by a construction of the bankrupt law? If it was a lien, should it be proved up as other claims? Or, could the holders of the notes stand aloof and enforce their lien at pleasure? We must look to the bankrupt law to determine this. Does not this involve a question arising under this law of congress? Or, suppose that the vendor's lien has been lost by the assignment of these notes—that they were scheduled as a part of the debts of Carr, and that their owners failed to prove them up against the estate of Carr—how are we to ascertain what effect this had as to these notes but by a reference to the bankrupt law? Or, suppose they were proved as debts against the estate without their having behind them a vendor's lien, and Carr received a complete discharge from all his liabilities, how can we tell how this would affect the rights of the holders of these notes, and the purchaser of this land, but by going to the bankrupt law? That law points out plainly the status of legal and equitable liens against the property of a bankrupt. How can we tell whether a secured creditor must prove his demand, but by a construction of the bankrupt law? How can we tell whether he can stand by and not prove his debt, but wait until bankruptcy proceedings are closed, and then enforce his lien in a state court, except by

Connor v. Scott.

reference to the law of bankruptcy? Is a vendor's lien preserved in bankruptcy? How do we know whether it is or not? By simply construing the bankrupt law. Is it ever forfeited? If so, what will work a forfeiture? How do we know the answers to these questions? By going to the bankrupt law. Does the assignee ever sell free from the lien, or does he always sell subject to the same? How are we to know, but by a construction of this law of the United States? Can the holder of a lien enforce it after discharge? If so, how? Can any one answer without placing a construction on the bankrupt act?

These are questions that come up in this case. Their correct decision depends on the construction of a law of congress. If they do come up in this case, then it is a suit which involves questions arising under a law of the United States and dependent for their settlement on a construction of that law, and, therefore, within the judicial power confided to the courts of the Union.

I cannot pass this case without making a remark as to the delicate position in which a judge of the federal court is placed when called on to settle a question of jurisdiction arising between his own court and the court of a state, especially when that question has been passed on by the judge of that court. Yet, with due deference to the judge of the state court, and with high regard for his opinions, I adopt the language of Chief Justice MARSHALL, in *Cohens v. Virginia*, while speaking with reference to the jurisdiction of the supreme court: "It is most true that this court will not take jurisdiction if it should not, but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution; we cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties a case may be attended, we must decide it if it be brought before us; we have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given; the one or the other would be treason to the constitution. Questions may occur which we would gladly avoid,

Connor v. Scott.

but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously perform our duty."

In doing this in this case, I find this court having jurisdiction; the motion to strike the case from the docket will, therefore, be overruled.

MOTION DENIED.

REPORTS OF CASES DETERMINED
IN THE
Circuit Court of the United States,
FOR THE
DISTRICT OF COLORADO.

AMES and DUFF v. COLORADO CENTRAL RAILROAD
COMPANY.

1. The effect of the admission of the territory of Colorado as a state, and the erection of federal courts therein (Laws of Congress, 1875-76, p. 61), and the extension of the laws of the United States over the same, was, *ipso facto*, to extinguish the territorial government and the territorial courts as courts of the general government.
2. By special provisions in the enabling act and the constitution of the state, the territorial courts, on the admission of the state, became the provisional and temporary courts of the state.
3. The above mentioned act of June 26th, 1876, makes provision for the disposition of all cases pending in the territorial courts at the time of the admission of Colorado into the Union; cases of federal character are transferred to the proper federal court; other cases to the state courts.
4. The federal character of the cause must appear in the pleadings or of record; if it does not thus appear, the state court may lawfully proceed therein, and its action will be valid.
5. Where the federal jurisdiction depended on citizenship, and the requisite citizenship to give federal jurisdiction did not appear of record, the party who does not reveal such citizenship, but after the admission of the state proceeded actively in a cause pending in the local courts, was held to have made his election under the act of June 26th, 1876, to remain in the state court. Whether such election would preclude the party from taking a transfer of the cause under the general removal acts, *quære?*

Ames v. Railroad Company.

(Before DILLON, Circuit Judge.)

Admission of Colorado as a State and its Effect upon the Territorial Courts and upon Causes Pending therein at the time of such Admission.—Construction of Enabling Act (18 Stats. at Large, 474) and the Act of Congress of June 26th, 1876, Creating Federal Courts in Colorado.

THIS cause came before the circuit judge on a motion by the plaintiffs for an order on the clerk of the United States circuit court for Colorado to docket the cause (the original files from the territorial court accompanying said motion, as also a certified transcript), and for a further order on the said clerk to issue a writ of assistance in said cause to the United States marshal of Colorado, to put the receiver heretofore appointed by the judge of the local court in possession of the road and property of the defendant company. This motion is resisted by the railroad company.

The files and records submitted show the following facts, stated in the order of their occurrence: June 21st, 1876, the bill in this case was filed in the district court of the United States of the late territory of Colorado, for the county of Boulder, by Ames and Duff, the trustees of a mortgage made by the defendant company, dated June 1st, 1872, upon the railroad property, tolls, income, and franchises of the company, to secure bonds to the amount of one million two hundred and twelve thousand dollars, with coupons payable semi-annually, alleging default in payment of interest due December 1st, 1872, to and including June, 1876, and praying an injunction (for reasons stated), restraining the company from disposing of or encumbering its property, or increasing its capital stock, for a receiver, and a foreclosure of the mortgage. The railroad company is the only defendant. That is the general nature of the bill which was filed in the local court on the 21st of June of the current year. July 13th, 1876, the company filed a plea to the jurisdiction of the Boulder district court, which, on July 18th, was overruled. July 22d, 1876, the company filed an answer to the merits, and

Ames v. Railroad Company.

on July 24th a replication was filed by the plaintiffs. The motion for the appointment of a receiver was resisted and not finally determined until early in August, when the district court of Boulder county appointed a receiver. The receiver was unable to obtain possession, and on August 12th, 1876, the judge of the said court ordered out a writ of assistance to put the receiver in possession. While the application for a receiver was pending, and before it was decided, namely, August 1st, 1876, the proclamation of the president was issued for the admission of Colorado as a state.

The pleadings show that the defendant company is a corporation created by the late territory of Colorado, but the citizenship of the plaintiffs (Ames and Duff) is not shown by the bill of complaint, except by the following averment:

"Humbly complaining, Fred. L. Ames, of Easton, Massachusetts, and John R. Duff, of the city of Boston, and state of Massachusetts, state that they are trustees," etc.

There is no distinct averment that they are citizens of the state of Massachusetts.

October 24th, 1876, an affidavit, sworn to October 23d, 1876, was filed with the clerk of the Boulder district court (the court not being in session) by one of the plaintiffs' solicitors, stating that "the said Ames and Duff, complainants in said suit, are citizens of the state of Massachusetts, and the Colorado Central Railroad Company is a corporation," etc., containing no statement as to the citizenship of the plaintiffs at the time when the suit was commenced in the territorial court, though in the disposition finally made of it that is not very material; but in other cases it is certainly desirable, if not necessary, that there should be shown citizenship at the time when the suit was commenced, and the said clerk was at the same time notified in writing by the said solicitors that, "upon the filing of the affidavit, the above entitled cause becomes transferred to the circuit court of the United States for this circuit, and transmit the files and certified copy of the record entries in said cause to the said circuit court." That is, in brief, the state of the cause in the local court.

Ames v. Railroad Company.

Now, as to the legislation applicable to this cause. March 3d, 1875, the enabling act in respect to Colorado was passed. March 14th, the constitution of Colorado was framed. June 26th, 1876, the act of congress "to further the administration of justice in the state of Colorado," and creating the federal courts therein, was passed. July 1st, 1876, an election was held, at which the constitution was adopted. August 1st, 1876, the proclamation of the president declaring Colorado admitted as a state, was issued. The enabling act, aforementioned, contains the following: "SEC. 1. That the inhabitants of the territory of Colorado are hereby authorized to form for themselves, out of said territory, a state government, with the name of the state of Colorado, which state, when formed, shall be admitted into the Union upon an equal footing with the original states in all respects whatever, as hereinafter provided."

The fifth section provides that if a majority sanctions that constitution, the president, without any further action, may issue his proclamation, and thereupon the state becomes admitted without any action whatever on the part of congress. Then follows a provision as to senators and representatives, and the one supposed to be material, in these words: "And until said state officers are elected and qualified under the provisions of the constitution, the territorial officers shall continue to discharge the duties of their respective offices."

That is the enabling act. The above mentioned act of congress of June 26th, 1876, as to the federal courts in Colorado, contains the following: "That when the state shall be admitted into the Union, according to the provisions of the act approved March 3d, 1875, the laws of the United States not legally inapplicable shall have the same force and effect within the said state as elsewhere within the United States; and said state shall constitute one judicial district, to be called the district of Colorado, and for said district a district judge, a marshal, and a district attorney of the United States shall be appointed by the president, by and with the advice and consent of the senate, with the same rights, powers, and duties provided by law for similar officers in

Ames v. Railroad Company.

the other states, except as herein otherwise provided; and said district of Colorado shall be attached to, and constitute a part of, the eighth judicial circuit; and a term of the circuit court and district court for said district, shall be held at Denver, in said state, on the first Tuesday in July and on the first Tuesday in December in each year."

Sections 5 and 8 are material. Section 5 contains a provision in respect to the disposition of pending cases in the supreme court of the United States, on writs of error or appeal from the supreme court of the territory of Colorado, and that such cases "may be heard and determined by the supreme court of the United States, and the remand of execution or of further proceedings shall be directed by the supreme court of the United States to the circuit or district courts of the district of Colorado, or to the supreme court of the state of Colorado, as the nature of the case may require; and each of said last mentioned courts shall be the successor of the supreme court of Colorado territory, as to all such cases, with full power to proceed with the same, and to award the mesne of final process therein."

Section 8, which is the section in relation to pending cases in the territorial courts: "That in respect of all cases, proceedings, and matters pending in the supreme or district courts of the territory of Colorado, at the time of the admission of said state into the Union, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States, had said courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of the supreme and district courts of said territory, and all the files, records, and proceedings relating thereto shall be transferred to said circuit and district courts respectively, and the same shall be proceeded with therein in due course of law."

This is all there is in the acts of congress relating to this cause. In the constitution of the state of Colorado, are the following provisions: Article VIII., section 7, provides for the general

Ames v. Railroad Company.

election to be held on the first Tuesday in October, and at that election state officers, including judges, were elected by the people.

In the fifth section of the schedule is this provision: "Whenever any two of the judges of the supreme court of the state, elected or appointed under the provisions of this constitution, shall have qualified in their office, the causes theretofore pending in the supreme court of the territory, and the papers, records, and proceedings of said court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the supreme court of the state, and, until so superseded, the supreme court of the territory and the judges thereof shall continue with like power and jurisdiction as if this constitution had not been adopted. Whenever the judge of the district court of any district, elected or appointed under the provisions of this constitution, shall have qualified in his office, the several causes theretofore pending in the district court of the territory within any county in such district, and the records, papers, and proceedings of said district court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the district court of the state for such county, and, until the district courts of the territory shall be superseded in manner aforesaid, the said courts and the judges thereof shall continue with the same jurisdictions and powers to be exercised in the same judicial districts, respectively, as heretofore constituted under the laws of the territory."

Mr. Poppleton, for the motion.

Messrs. Smith & Hall, against it.

DILLON, Circuit Judge.—The motion here presented, namely, to docket this cause in the federal court, and for a writ of assistance, derives its importance not only for the large interests involved in the particular cause, but from the fact that the principles upon which it must be determined necessarily fix the *status*, as respects federal or state jurisdiction, of all other causes pending in the courts of the late territory of Colorado at the

Ames v. Railroad Company.

time of its admission, August 1st, 1876, into the Union as a state. These considerations have induced me to submit the conclusions at which I have arrived to the justice of the supreme court allotted to the circuit, for his judgment thereon.

In examining the question here arising, the legislation of congress in respect to the admission of other territories as states, and establishing federal courts therein on their admission, has been examined, as well, also, as the several judgments of the supreme court as to the effect of such legislation. (Florida: 5 Stats. at Large, 742, 788, construed in the leading case of *Benner v. Porter*, 9 How. 235; *Hunt v. Palao*, 4 How. 589; Iowa: *Webster v. Reid*, 11 How. 437; Texas: 9 Stats. at Large, 1108, construed in *Calkin v. Cockle*, 14 How. 227; Wisconsin: 9 Stats. at Large, 567, 233, construed in *McNally v. Batty*, 10 How. 72; Nevada: 13 Stats. at Large, 30, 440, construed, 2 Wall. 160; Nebraska: *Express Company v. Kountze*, 8 Wall. 342.)

It is not deemed necessary to refer to this legislation, and to these cases, at any considerable length. They demonstrate the absolute necessity, on the erection of a territory into a state, and the admission of the latter into the Union, of legislative provisions by congress and the state as to causes pending in the territorial courts at the time of such admission.

The effect, judicially declared, of the unconditional admission of a territory as a state, and the erection of federal courts therein, and the extension of the laws of the United States over the same, is *ipso facto* to extinguish the territorial government, and with it the existence of the territorial courts of the general government. In the Florida case (*Benner v. Porter*, 9 How. 235, 241,) there was a provision in the constitution of the state, as there is in the constitution of Colorado, to the effect that all "territorial officers should hold and exercise their respective offices and appointments until superseded under this constitution." This was considered by the supreme court as being done to prevent an *interregnum*, and to have that effect, not by continuing even *sub modo* the territorial existence, but by making these officers, by the force of the

Ames v. Railroad Company.

state constitution, and the assent of congress to the admission of the state into the Union, state officers for the time being.

The territorial courts cease, on the admission of the state, to be courts of the territory, for the territorial government is displaced and abrogated; but, by adoption on the part of the state, with the consent of congress, these courts become the provisional and temporary courts of the state.

The act of congress of June 26th, 1876, in respect to the administration of justice in Colorado, unmistakably proceeds upon this view. It declares that the laws of the United States shall have force and effect immediately on the admission of the state. It created and established at once federal courts in the state, and makes more specific and careful provisions as to the disposition of pending cases, whether in the supreme court of the United States or in the supreme and district courts of the territory, than had been done by congress in any other instance in providing for a change from territorial existence to that of a state. That act determines what shall be done with "all cases" pending in all the territorial courts, "*at the time of the admission of said state into the Union.*" Pending cases which *might* have been brought in the federal courts established by the act, had such courts existed when the cases were commenced, are transferred to the proper federal court, which is declared to be the "*successor*" of the territorial courts, a term which implies that these courts cease to exist as courts of the general government. All other cases remain and belong to the courts adopted or established by the constitution of the state. Cases of federal jurisdiction may be such by reason of parties, as where the United States or a federal corporation is a party, or because they arise under the constitution and laws of the United States, or because of citizenship, without respect to subject matter.

The federal character of a case must appear in the pleadings, or of record. If the federal character of a case pending at the time of the admission of Colorado thus appears, it belongs to the federal courts, if the case be such, as to subject matter or parties and amount, as that it might have been brought in such

Ames v. Railroad Company.

federal court if it had been in existence when the suit was commenced. If the federal character of a pending cause does not thus appear, the court in which it is pending may rightfully proceed therein after the admission of the state, at least until it is shown to the court that it is one of federal cognizance.

In the present cause the pleadings did not show that it was one of federal character, as there was no averment in the bill of complaint of the citizenship of the plaintiffs. As the cause was in the court and the court was in existence, and the federal character of the cause did not appear, it follows that the court had jurisdiction to act therein after the admission of the state.

It is contended by the defendant company that the complainants have elected to remain in the state court, and that, having done so, they are bound thereby, in virtue of the common law principle that an election once deliberately made is binding and irreversible. In other words, after the 1st day of August, the plaintiffs could have taken steps to show the federal character of the cause, and arrested all further action of that court. Instead of doing this, they invoked the continued exercise of the jurisdiction and powers of that court, and obtained in August an order appointing a receiver, and subsequently procured an order for a writ of assistance, which was issued. After having, with knowledge of all the facts as to jurisdiction, done this, can they afterwards change the forum, and if so, what limitation in point of time exists, and can it be exercised down to the time of final hearing? It is my judgment, in a case whose federal character does not appear of record, that the party who, with knowledge of all the facts, wishes the case to go to the federal court under section 8 of the act of June 26th, 1876, must take his election before voluntarily invoking the action and power of the court; otherwise he is concluded from afterwards electing to reveal its federal character, and have a transfer by virtue of the last mentioned act.

The case, by his consent and action, has become one belonging to the local court, and can only be removed therefrom, if at all, under the removal acts applicable generally to the transfer of

Ames v. Colorado Central Railroad Company.

causes from the state to the federal courts. It may be true that the plaintiff can, like other suitors elsewhere, have the benefit of the removal acts, if he can bring his case within them, but it is not necessary to determine this point.

The result of these views is that, as the plaintiffs, after the admission of the state, not only voluntarily submitted to the action of the local court, but invoked it and obtained it, they could not afterwards transfer the cause on affidavits filed with the clerk of that court, in the manner here attempted.

The motion to docket the cause in the circuit court must therefore be denied.

MR. JUSTICE MILLER.—I concur in this opinion—in the first part of it, fully; in the latter part of it, on the ground that the party now seeking to docket the case in the circuit court took active steps in the case after he had the right to have it docketed in the circuit court. But, in the future application of the rule, I should not accept silence or passive inaction in the state courts as conclusive against a party of his election between the two courts.

MOTION DENIED.

AMES v. COLORADO CENTRAL RAILROAD COMPANY.

1. The act of March 3, 1875 (II. Sess. 43 Cong. chsp. 137), which provides that any suit "now pending or hereafter brought in any state court" of the description therein specified, may be removed into a federal court, is not applicable to a suit brought in a territorial court, although, on the admission of the territory as a state, such suit passed into the jurisdiction of a state court.
2. Under that act, application to remove a cause must be made to the state court at or before the term in which, according to the local law and practice of the court, the cause could have been finally heard. Accordingly, where issue was joined nearly one month before the end of a term of the state court, and it does not appear but that a final hearing could have been had at that term, an application thereafter made to remove the cause under the act of 1875 will be denied. (See, on this point, *Scott v. Clinton and Springfield Railroad*, 6 Bissell, 529.)

Ames v. Colorado Central Railroad Company.

(Before DILLON and HALLET, JJ.)

Removal of Causes.—Act of March 3, 1875.—Time.

IN CHANCERY. Bill to foreclose a mortgage.

A very full history of this case is given in connection with the opinion of the circuit judge on the motion to docket under the act of June 26, 1876, which was announced at this term (*ante*, p. 251).

For convenience, it may be well to state the following again: The bill was filed in the district court of Boulder county, June 21, 1876; issue was joined July 24, 1876; the territory of Colorado became a state by proclamation of the president, August 1, 1876, and the last order made at the July term of the Boulder court was entered August 21, 1876. After the motion to docket the case in this court was denied, and on the 7th of December, 1876, plaintiffs filed in the state court a petition alleging that they are citizens of Massachusetts, and defendant is a corporation created by a law of the territory of Colorado, and other facts, substantially as required by the act of 1875 concerning the removal of causes from state to federal courts. A bond was also filed, with conditions as required by that act, the sufficiency of which was not questioned in this court. Afterwards (December 9, 1876), plaintiffs filed in this court a transcript of the files, record, and proceedings in the Boulder court, and sought to have the cause removed. Thereupon, December 11, defendant moved to dismiss, which is here treated as a motion to remand.

E. L. Smith, for the motion.

A. J. Poppleton and J. I. Redick, *contra*.

HALLET, J.—This suit was brought in the district court of Boulder county, under the late territorial government, and the question here presented is, whether it may be removed into this court under the act of congress of March 3, 1875. In terms, that act extends to cases then pending or thereafter to be brought in any state court. This suit was not then pending in any court, nor

Ames v. Colorado Central Railroad Company.

was it afterwards brought in a state court, although it came into such a court by operation of law on the admission of the state, sometime after it was begun.

It was ingeniously urged in the argument at the bar that, by assenting to the jurisdiction of the state court, plaintiffs did in fact bring the suit in that court; but this will not bear examination. The bringing of a suit is understood to mean the institution or commencement of it, and so the language is in Revised Statutes, section 639, on the same subject. This occurred in this instance in a territorial, not a state court. Pending the suit the character of the court was changed into a state court, and there being nothing in the record to show its federal character, the court retained jurisdiction of it. (*Ante*, p. 251.)

Plaintiffs did not in any sense bring the suit in or into the state court. They found it there, where the law had left it in the transition from a territorial to a state government, and they consented to go on with it in that jurisdiction. In that way they consented to remain in the state court; but they did not, in any reasonable construction of the act of 1875, bring the suit in that court. This view is enforced by the circumstance that congress has provided a special way of transferring causes on the admission of a state by general law (Rev. Stats. secs. 567, 569, 704), and also in this instance by the act establishing this court, June 26, 1876. This legislation, relating to a particular class of cases and designed to carry out the general purpose of the removal acts, seems to proceed on the theory that the latter are not applicable to cases which originate in a territorial court. If congress had consigned all federal cases to the state courts, plaintiffs would be within the reason, if not the letter, of the removal acts. But this was not done; and that which was done does not in any way tend to prove that the removal acts are by construction to be extended to cases like this—i. e., to cases not within their terms. If, however, this reasoning is unsound, there is another obstacle to the removal of the cause.

Accepting the act of 1875 as applicable to the case, by the third section it is provided that the petition for removal shall be

Ames v. Colorado Central Railroad Company.

filed in the state court "before or at the term at which said cause could be first tried, and before the trial thereof." The term here referred to appears to be that at which the cause may be tried or heard on the merits, according to the practice of the court, without regard to the special circumstances of the case, as whether the parties are ready for trial, and the like.

Certainly we cannot, in determining a question of this kind, enter into every circumstance that may delay or facilitate the progress of a cause, as whether there are nice points to be decided, which require time for consideration, whether the court was otherwise occupied, and so on. Such an investigation would be in every way embarrassing and uncertain as to the result, and therefore it may be dismissed as impracticable. We are, then, to inquire whether, according to the practice of the court, this suit could have been finally heard at the July term of the Boulder court, without reference to any of those circumstances that have been mentioned as likely to retard its progress. It appears that issue was joined on the 24th day of July, 1876, and the court remained in session for a period of twenty-eight days thereafter.

No time was allowed, by rule of court or otherwise, for taking testimony, and we cannot assume that any specific time was necessary. It was claimed at the bar that our rule, 69, should govern, but that rule was not in force in the Boulder court. (*Palmer v. Cowdrey*, 2 Col. 1.) So far as the record shows, the cause could have been brought on at any time within the twenty-eight days which remained of the term after issue was joined. If the writer may speak from his own knowledge of the course of practice in the territorial courts, he feels bound to declare that it was entirely regular to bring a cause to hearing at the term in which issue was joined, and this was often done, especially in foreclosure suits. It is true that important suits often went over the term; but this was owing to the press of business, or other extraneous cause, and not to any rule of practice. It seems, therefore, that the application to remove the cause was not in apt time, not being made at the term when a hearing could have been had.

Ames v. Colorado Central Railroad Company.

For these reasons, the motion to remand will be allowed, with costs.

DILLON, *Circuit Judge*.—I concur. I am inclined to think the first ground sound; but if, under the local law and practice, the case *could* have been finally heard at the July term, then I am clear that the application for removal should have been made at that term, assuming that the act of March 3, 1875, applies to the case.

MOTION SUSTAINED.

NOTE.—

GAFFNEY *et al.* v. GILLETTE *et al.*

(Before DILLON and HALLETT, JJ., July Term, 1878.)

Removal of Causes Pending in Territorial Courts at the time of the Admission of Colorado as a State, into the Federal Courts.—Act of June 26, 1876 (19 Stats. at Large, p. 62, Sec. 8), and Act of March 3, 1875, as to Removal of Causes, Construed.

THE plaintiffs move to remand this cause to the state court.

Mr. Johnson, for the plaintiffs.

Mr. Webster, for the defendants.

DILLON, *Circuit Judge*.—At the time of the admission of Colorado as a state, this cause was pending in the supreme court of the territory on appeal from a final decree of one of the district courts of Colorado territory. The plaintiffs were then and still are citizens of Illinois, and the defendants citizens of New York and Colorado. The supreme court of the state, in consequence of the provisions of section 8 of the act of June 26, 1876 (19 Stats. at Large, 62), refused to entertain jurisdiction of the cause, or to decide the same, unless both parties should invoke its action and submit the same to its judgment. The parties did this by a written stipulation duly filed. The supreme court of the state, after argument, reversed the decree below and remanded the cause to the proper district court of the state, with leave to complainants to amend their bill, if so advised, and with leave to one of the defendants to file a cross-bill, if so advised, and dismissing the bill as to another defendant, unless the complainants should make him a proper party by an amended bill to be filed within such time as the court should direct.

After the case was remanded an amended bill was filed, and the same was demurred to by the defendants. At the same term the defendants filed their petition to remove the cause to this court, on the ground of citizenship of the parties, and the removal was ordered. The plaintiffs now move to remand the cause to the state court.

Bates v. Payson.

We hold that the defendants waived their right to a removal of the cause under the above mentioned act of congress of June 28, 1876, by their voluntary and deliberate submission of the same to the supreme court of the state.

We also hold that it was too late to remove the cause under the act of March 3, 1875, even if it be conceded that said act has any application to this cause.

HALLETT, J., concurs.

REMANDED.

JOSEPH E. BATES v. JOSEPH R. PAYSON.

Under the act of congress (19 Stats. at Large, p. 61, sec. 8), establishing federal courts in the state of Colorado, and providing for the disposition of cases pending in the *supreme* and district courts of the territory at the time of the admission of the state into the Union, *cases of a federal character* pending on appeal or writ of error in the supreme court of the territory at the time of the admission of the state, may be heard and decided in the proper federal court created by said act, which may affirm the judgment below or reverse it and order a new trial in the federal court, and in either case enter final judgment.

(Before MILLER, Circuit Justice.)

Admission of Colorado into the Union.—Disposition of Causes of a Federal Character Pending in the Supreme Court of the Territory.—19 Statutes at Large, p. 61, Sec. 8, Construed.

PAYSON, assignee in bankruptcy of the Republic Insurance Company, of Chicago, Illinois, sued Bates in assumpsit in the district court of Arapahoe county, to recover a balance alleged to be due from the latter on his subscription to the capital stock of the company. The suit was brought and judgment was entered against Bates under the territorial government, and he, pursuant to a law of the territory, removed the cause into the supreme court of the territory by appeal. This appeal was pending in that court on the 1st day of August, 1876, when the territory became a state. It appears that the record of the case then passed to the supreme court of the state, from whence it was transferred to this court by agreement of parties.

Bates v. Payson.

It was suggested that this court has not jurisdiction to review the record of a territorial court, or to give any judgment whatever respecting it. It was also urged that if this court can, in any case, review a record of a territorial court, as to a judgment at law, the proceeding must be by writ of error, and not by appeal, as in this case.

The eighth section of the act of 1876 (19 Stats. at Large, 61), which, it was conceded, must govern, is as follows: "That in respect of all cases, proceedings, and matters pending in the *supreme* or district courts of the territory of Colorado at the time of the admission of said state into the Union, whereof the circuit or district courts [of the United States] by this act established might have had jurisdiction under the laws of the United States, had said courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said territory; and all the files, records, and proceedings relating thereto shall be transferred to said circuit and district courts, respectively, and the same shall be proceeded with therein in due course of law."

Mr. Thomas Macon, for the appellant.

Mr. J. W. Blackburn, for the appellee.

MILLER, *Circuit Justice*, presiding, overruled the objection. It was admitted that the case was one which might have been brought in a federal court, if such courts had existed at the date of the commencement of the suit. As such, the case was within the eighth section of the act. By that section this court is declared to be the successor of the supreme court of the territory as to all such cases, with power to proceed therein "in due course of law." This means that this court may do all that was left undone in the supreme court of the territory. The cause was pending in that court for review, and we may proceed as that court would have proceeded if it had retained the case. The way in which, under the territorial statutes, the cause was taken

Bartlett v. Russell.

to the supreme court of the territory, is not material to be considered. The act of congress applies to all cases of federal character pending in that court at the date of the admission of the state, and it matters not whether they were removed into that court by writ of error or appeal.

If it were necessary to remand the cause to the state court there would be a difficulty in disposing of it, but that was not required. Whether the judgment should be affirmed or reversed, we could enter the proper judgment here, and, if necessary, we could try the case again in this court.

Afterwards, and at this same term, argument was heard on the errors assigned, and the court finding no error in the record, the judgment was affirmed, and it was ordered that the said judgment be entered of record in this court.

JUDGMENT ACCORDINGLY.

ALBERT E. BARTLETT, Assignee, etc., v. EDWARD RUSSELL.

The statute of Colorado provides that "no writ of *feri facias*, or other writ of execution, shall bind the estate of the defendant but from the time such writ is delivered to the sheriff or other proper officer to be executed." Under this statute, an execution on a judgment is a lien on the debtor's property from the time it is delivered to the sheriff to be executed, which will be protected in bankruptcy, and will not be defeated by a petition in bankruptcy, filed after the delivery but prior to the levy of the execution.

(Before MILLER, Circuit Justice.)

Bankrupt Act.—Office of Petition for Review.—Lien of Fi. Fa. on Goods and Chattels.

THIS was a petition for review, filed by Bartlett, assignee in bankruptcy of Peabody, to reverse an order of the district court,

•

Bartlett v. Russell.

in bankruptcy, in favor of the respondent, Russell. The material facts appear in the opinion, orally given, of the circuit justice.

Blake & Jacobsen, for the petitioner.

Thomas Macon, for the respondent.

MILLER, *Circuit Justice*.—I have given to this case all the consideration I shall have time to give it, and, although there are conflicting authorities upon the subject, I have arrived at a conclusion satisfactory to myself, and will proceed to announce it.

The case is this: The bankrupt was sued in the state court by Edward Russell, who obtained a judgment against him, and fearing that he would probably not make his money otherwise, he obtained an order from the court, and had execution issued and placed in the hands of the sheriff. In about an hour after that was done, the bankrupt filed his petition in bankruptcy, and in about an hour after that the execution was levied upon the personal property of the debtor. While the sheriff was taking an inventory, however, the marshal of the United States made his appearance, and claimed the property under the orders of the district court, and it was delivered to him. Afterwards a petition was filed in the United States district court by Russell, asking that the proceeds of that property, which had been sold, might, as far as was necessary, be appropriated to the payment of this debt, and the district court gave the order directing that the debt be paid out of the assets, as far as the property levied upon would pay it.

For the reversal of that order, the assignee of the bankrupt had filed a *petition* here, and the first question is as to the jurisdiction of this court. I have some doubt about that — whether the order of the district court may be reviewed on petition in this way. I have concluded, however, to give the petitioner the benefit of the doubt, since the whole matter seems to have been conducted in a summary way; and I am rather inclined to the opinion that this is one of those questions which may be reviewed

●

Bartlett v. Russell.

by this form of proceeding—which may be called the extraordinary jurisdiction of the circuit court under the bankrupt law.

The question then recurs, whether the order of the district court was correct, that the plaintiff, Russell, had established such a lien on the goods of the bankrupt, seized under the writ of execution, as required that they should be first appropriated to pay his judgment.

The question is one, or ought to be one, upon the local laws of this state, because it is a question whether, under the laws of the state of Colorado, the proceedings which the plaintiff in the original suit instituted for the purpose of making his debt, created such a lien that it should be respected in the bankruptcy proceedings.

But, while you have a statute in this state upon this subject, there are no decisions construing the statute. The counsel, in the argument, referred to no such decisions, and my associate says there have been none in this state upon it. But the statute is one which exists, and has long existed in other states, and is in precisely the same words as the statute of Kentucky and Illinois, and is said to have been copied from the statute of Illinois; and the counsel for the petitioner, in his argument, relies upon the decisions of the state court of Kentucky construing that statute. The statute is: "That no writ of *fiery facias*, or other writ of execution, shall bind the estate of the defendant or defendants but from the time such writ shall be delivered to the sheriff or other proper officer to be executed." This is a limitation of the common law, by which the goods and chattels of the party were bound from the time the writ was tested.

Now, I cannot go into all the authorities which were referred to the other day in the argument. The argument was an able and exhaustive one, and a great many authorities were cited. The English authorities are in conflict with the authorities in this country. I can only say, in view of the principle of our bankrupt law, that I am of the opinion that there was such a lien as gave to the plaintiff in the action at law the right to

Bartlett v. Russell.

appropriate that money to the payment of his debt; and that there was a lien of some kind is not disputed.

Some cases were cited, showing that a subsequent execution, or an execution delivered to the sheriff subsequent to the first one, may appropriate property to the exclusion of the lien established by the first execution delivered to the officer. But that whole subject was reviewed by the supreme court, in the case of *Waller, assignee in bankruptcy, v. James & Joseph Best*, 3 How. 111. That was a case concerning the effect of this statute in the state of Kentucky, and that eminent jurist, Chief Justice TANEY, after reviewing the decisions of the state court of Kentucky, uses this language in reference to the decision of the state court in the case of *Addison et al. v. Orow et al.*: "This is the latest decision in the courts of the state to which we have been referred, or of which we are aware, and, as we have already said, it appears to have been well considered. And whatever doubts might before have been entertained, we must, under the authority of this case, regard it as the settled law of the state, that the creditor obtains a lien upon the property of his debtor by the delivery of the *feri facias* to the sheriff; that it acquires no additional validity or force by being actually levied, but that the lien is as absolute before the levy as it is afterwards, and continues while the process remains in the hands of the sheriff to be executed."

It does not become me to overrule that decision, and it was upon decisions of the state of Kentucky that the counsel for petitioner rely to show that the lien was not an absolute one.

I read the above from Curtis's decisions of the United States supreme court, the chief value of which lies in the head notes, and his head notes, although brief, are entitled to great weight, as expressing the result of the case. He says, in the head notes to this case: "In Kentucky, the delivery of *feri facias* to the sheriff creates a lien on the debtor's lands, which is as valid before as after a levy." Not only is this case an authority which I do not feel like overruling, but it meets my approval. I think that there is a lien established by the delivery of the execution

Ex parte Shaffenburg.

to the sheriff. The construction of our bankrupt law by the supreme court has tended very much of late years to give effect to liens established by judicial proceedings, in which there was no collusion, no summary process, but a lien obtained by the orderly and regular course of judicial proceedings, and not by attachment; and such liens will be respected by the federal courts in the administration of the bankrupt law.

The judgment of the district court in this case is affirmed.

AFFIRMED.

Ex parte SHAFFENBURG.

1. An erroneous decision of a court having jurisdiction of the offence and of the person indicted, cannot be re-examined on *habeas corpus*.
2. Section 5438 of the Revised Statutes, prohibiting the making or presenting of false claims and bills against the general government, construed.
3. This statute distinguishes between the *making* and the *presenting* of a false claim, and makes each a distinct offence.
4. A false account made by a marshal within the limits of Colorado, and presented to the court and approved in Colorado, and afterwards presented to the treasury department in Washington, is a complete offence as to the *making* in Colorado, for which the offender may be there indicted.

(Before MILLER and DILLON, JJ.)

Indictment for Fraudulent Claims against the Government.—
Jurisdiction.—Revised Statutes, Sec. 5438, Construed.

MR. HUGH BUTLER presented the petition of M. A. Shaffenburg for a writ of *habeas corpus*. The petitioner was the late United States marshal for the territory of Colorado, and was convicted by the United States district court under an indictment founded upon section 5438 of the Revised Statutes of the United States, and sentenced to imprisonment for the term of two years in the penitentiary of the state of Kansas. He presented to the circuit court his petition for a writ of *habeas corpus*, alleging that his

Ex parte Shaffenburg.

imprisonment is unlawful. The indictment contains two counts, the first, in substance, charging that the petitioner, being the marshal of the United States for the territory of Colorado, made and caused to be made therein, a false, fictitious, and fraudulent claim against the United States, in respect of court expenses, stating the amount, and presented, and caused the same to be presented, to the treasury department of the United States for the purpose of obtaining the payment thereof. The second count is as follows:

"And the grand jurors aforesaid, on their oaths aforesaid, do further present that the said Mark A. Shaffenburg, late of Arapahoe county, in the first judicial district of Colorado territory aforesaid, heretofore, on the third day of December, in the year of our Lord one thousand eight hundred and seventy-four, at the said county of Arapahoe, in the first judicial district of Colorado territory aforesaid, and within the jurisdiction of this court, being then and there marshal of the United States for the territory of Colorado, did then and there make and cause to be made for payment and approval by officers of the treasury department of the United States, a false, fictitious, and fraudulent claim, amounting to the sum of to-wit: nine thousand three hundred and eighty-eight dollars and fifty-six cents, in words and figures following:

"THE UNITED STATES IN ACCOUNT CURRENT WITH M. A. SHAFFENBURG,
UNITED STATES MARSHAL FOR THE DISTRICT OF COLORADO, FOR THE
EXPENSES OF THE UNITED STATES DISTRICT COURT, HELD AT DENVER,
COLORADO, SEPTEMBER TERM, 1874:

	<i>Dr.</i>
Compensation of United States grand jury (abst.), . . .	\$344 35
Compensation of United States petit jury (abst. 2), . . .	300 80
Compensation of United States witnesses (abst. 3), . . .	439 00
Before United States commissioner, supplemental, . . .	298 85
Before United States marshal, supplemental (abst. 47), . . .	402 95
Contingent expenses, supplemental (abst. 6), . . .	485 25
Commissions on \$1868.25 disbursed, at two per cent (abst. 46), . . .	37 36
Balance due the United States,	5,106 59
	\$14,495 15
	<i>Cr.</i>
By amount from former account current,	\$14,495 15

Ex parte Shaffenburg.

“District of Colorado, ss:

“M. A. Shaffenburg, marshal of the United States for the district of Colorado, being duly sworn, deposes and says, that the services stated in the foregoing account, and in the abstracts and vouchers therein referred to, have been rendered as therein stated; that the supplies charged were furnished for and used by the court; that the disbursements charged, and all the expenses stated therein, were necessary and proper, and were paid in good faith, and that all the items charged are correct and legal, and the amounts thereof justly due to him as therein stated, as he verily believes.

“(Signed.)

M. A. SHAFFENBURG.

“Subscribed and sworn to this 3d day of December, in the year 1874, before me.

“(Signed.)

JOHN W. WEBSTER,

[SEAL.]

“Clerk Supreme Court Colorado Territory.

“Approved:

“(Signed.)

E. T. WELLS,

“Judge First Judicial District, Colorado Territory.

“And he, the said Mark A. Shaffenburg, did, on the said 3d day of December, in the year of our Lord one thousand eight hundred and seventy-four, present, and cause to be presented, the said false, fictitious, and fraudulent claim to the first auditor and the first comptroller of the treasury department of the United States, and the treasurer of the United States, for payment and approval, the said first auditor and first comptroller of the treasury department of the United States and the said treasurer of the United States being then and there persons and officers in the civil service of the United States, knowing the said claim to be false, fictitious, and fraudulent; and for the purpose of obtaining and aiding to obtain the payment and approval of said false, fictitious, and fraudulent claim, he, the said Mark A. Shaffenburg, did, then and there, make, use, and cause to be made and used, a certain false voucher, designated therein ‘voucher 6,’ in words and figures following:

Ex parte Shaffenburg.

"THE UNITED STATES, TO M. A. SHAFFENBURG, *United States Marshal,*
Dr.

"For maintaining and subsisting United States prisoners during their time of confinement awaiting trial, as follows: Of United States prisoners Gustave Buchasen, Charles Leichering, and Florain Spalti, from July 18th to November 17th, 1874, inclusive—three persons, one hundred and twenty-five days each — three hundred and seventy-five days, at \$1.15 per day, \$431 25

[Here follow other like bills or vouchers.]

"He, the said Mark A. Shaffenburg, then and there knowing the said vouchers to contain fraudulent and fictitious entries, with fraudulent design and intent, and with intent then and there to cheat and defraud the government of the United States, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

On the admission of the territory of Colorado as a state the indictment was transferred to the United States district court, in which the trial was had.

Hugh Butler and Thomas P. Fenlon, for the petitioner.

George R. Peck, *contra*.

DILLON, *Circuit Judge*.—The statute (Rev. Stats. sec. 5438) on which the indictment is based, when carefully examined, will be found to provide not only for the making or presenting for approval or payment of a claim against the government which is known to be false, fictitious, or fraudulent, but also for the making, for the purpose of obtaining, or aiding to obtain, the payment or approval thereof of "any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry." (Rev. Stats. sec. 5438.)

The first count of the indictment charges the petitioner with the making, in Colorado, of a false claim for court expenses, but that count does not, in terms, aver that the claim was in the form of a bill, account, or voucher. But the second count expressly charges the petitioner with the making of a false and fraudulent

Ex parte Shaffenburg.

bill and vouchers, which are set forth at large therein, and avers that this was done within the territorial limits of Colorado.

The precise claim of the petitioner is that the district court of Colorado was without jurisdiction in the case, because it appears from the indictment that it is legally impossible for that court to have cognizance of the offence therein charged, for the reason that the offence, as charged, was not consummated, and, in the nature of things, could not be consummated, in Colorado. It is contended by the petitioner that the *making* of a false and fraudulent claim by the marshal of the United States, within the meaning of the statute, necessarily involves the presentation of that claim for payment or approval, and as it is alleged that this claim was presented to the treasury department in Washington, there could be no completed offence until it was thus presented; and hence the jurisdiction to try the petitioner therefor is exclusively in the proper court in the District of Columbia.

In any view of the present case, it probably falls within and is governed by the decision of the supreme court in *ex parte Parks*, 93 U. S. R. 18. Inasmuch as the making of a false and fraudulent claim against the government is made a criminal offence, and jurisdiction over such offences is given to the district court, the question whether the particular indictment charged a completed offence within the district of Colorado, is one which that court was competent to decide, and would be required to decide on a demurrer to the indictment or on a motion in arrest of judgment.

If decided wrongly, the decision would be erroneous, but not void, and it is plain that an erroneous decision of this kind cannot be corrected on *habeas corpus*. But it is not necessary to place our judgment on this ground. Nor is it necessary to state what constitutes the making of a false claim within the meaning of the first part of section 5438. A subsequent clause in the section makes it a criminal offence to make any false paper, instrument, bill, affidavit, etc., for the prohibited purpose.

The second count in the indictment charges the making, by the petitioner, within the limits of Colorado, of a false bill, or

Ex parte Shaffenburg.

claim, in writing, which is set forth in full in the indictment. The offence was complete when that bill was made, as therein alleged, with the intent to use the same to obtain the payment thereof, just as much so as if, under another clause, standing in the same connection, the petitioner had made a false affidavit or deposition in Colorado with a view to obtain or aid in obtaining the payment or approval of a fraudulent claim by the treasury department in Washington.

The statute distinguishes between the *making* and the *presenting* of a fraudulent account or bill. It makes each a distinct offence. It may be that the offence of *presenting* a false bill or account to the treasury department in Washington can only be prosecuted in the courts of the District of Columbia; but the offence of *making* a false bill or account may be prosecuted in the judicial district in which the fraudulent claim is made. What constitutes or consummates the making of a false claim, within the meaning of the statute, may be difficult to define so as to embrace within the definition all cases that might arise. For the purposes of the present application, it is sufficient to say that we are of opinion that the facts averred in the second count of the indictment do show a completed offence within the territorial limits of the district of Colorado. In other words, our judgment is, that if a marshal of the United States for a given district shall make out a false and fraudulent bill against the United States for official services or expenses, and present the same to the court for approval, and, after having secured that, shall forward the same to the treasury department at Washington for payment, or otherwise cause the same to be there presented for this purpose, this is the *making*, in such district, of a false and fraudulent bill, within the meaning and purpose of the statute.

Such has been the construction which has heretofore been put upon this useful and necessary statute in the courts in this circuit, and elsewhere, so far as we know. The opposite construction overlooks the distinction which the statute so broadly marks between the *making* and the *presenting* of fraudulent

Arapahoe County v. Kansas Pacific Railway Co.

claims, and by confining the jurisdiction, in most cases, to the District of Columbia, would rob the statute of its utility by disabling the government to prosecute for its violation, except under obvious difficulties, and at great expense, both to itself and to the persons whom it accused.

Mr. Justice MILLER concurs in this exposition of the statute and in the opinion that the petitioner is not entitled, on the showing made, to a writ of *habeas corpus*. The writ is accordingly refused.

WRIT REFUSED.

NOTE.—See *ex parte Peters*, *ante*.

BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE COUNTY
v. KANSAS PACIFIC RAILWAY COMPANY *et al.*

1. The plaintiff, a citizen of Colorado, brought a stockholder's bill in a state court, in Colorado, making the defendants thereto the railroad company (also a citizen of Colorado), in which the plaintiff was a stockholder, viz.: the Denver Pacific Railway Company, and also the directors thereof, including two directors, citizens of Colorado, against whom, however, no charges were made, and no relief asked; also making a defendant another railroad company, viz.: the Kansas Pacific Railway Company (a citizen of Kansas), and certain individuals, all citizens of other states than Colorado. The object of the bill was to secure an accounting in favor of the Denver Pacific Company against the Kansas Pacific Company, and to secure a decree *in personam* against the non-resident directors of the Denver Pacific Company. The Kansas Pacific Company, and the individual defendants connected with that company, without being joined with the other defendants, applied to remove the suit to the circuit court of the United States, under the act of March 3, 1875: *Held*, that the suit was removable.
2. The right of removal cannot be defeated by the joinder as defendants of citizens of the same state with the plaintiff, if no relief is prayed against them, and they are made defendants without any right or reason or just cause.

Arapahoe County v. Kansas Pacific Railway Co.

3. In a stockholder's bill of the kind before the court, the company in which the plaintiffs are stockholders is a necessary party defendant, but the interests of the stockholders and the company are identical, and they represent one side of the controversy, and the company against whom the accounting and relief are sought represents the other.
4. The removal act of March 3, 1875, provides that the suit—the whole suit, and not a part of the suit—shall be removed; and under that act, if the requisite conditions exist, any one of the plaintiffs or defendants may remove the suit and carry the other parties with them.

(Before MILLER, Circuit Justice.)

*Removal of Causes.—Citizenship.—Act of March 3, 1875.—
"Controversy."—Suit.*

THIS suit was brought in the district court of Arapahoe county, by the complainants, against the Kansas Pacific Railway Company, the Denver Pacific Railway and Telegraph Company, Sayre, Moffat, Carr, Perry, Meier, Edgerton, Greeley, Dodge, Gould, and Dillon. The defendants, the Denver Pacific Railway Company, Sayre, and Moffat, are and were, with the complainants, citizens of the state of Colorado; the defendants, Dodge, a citizen of Iowa, and Gould and Dillon, citizens of New York. The three last named were not served with process, nor have they entered an appearance in the suit. The Kansas Pacific Railway Company, a citizen of Kansas, Carr, Perry, Meier, Greeley, and Edgerton, citizens of Missouri, united in a petition, accompanied by a sufficient bond, to the district court of Arapahoe county, for the removal of the suit into the circuit court of the United States for the district of Colorado. The judge of the state court indorsed his approval of the sufficiency of the bond, but declined to make an order for the removal of the cause. Nevertheless, the petitioners, in accordance with the conditions of their bond, filed, on the first day of the term of the circuit court of the United States, a certified copy of the pleadings and proceedings in the suit had in the state court, with the clerk of the circuit court, who docketed the cause as one properly removed; whereupon the complainants appeared

Arapahoe County v. Kansas Pacific Railway Co.

and moved the circuit court to remand the cause to the state court, on the ground that the cause had been improperly removed from the state court. The attention of the court was not directed to the fact that the state court had declined to make an order for the removal of the suit. The issues tendered by the bill are fully stated in the opinion of the court.

Wm. B. Mills, John I. Redick, and Charles R. Redick, for the plaintiff.

Alfred Sayre, John P. Usher, and A. H. Holmes, for the defendants.

MILLER, Circuit Justice.—The case of the Board of County Commissioners of Arapahoe County against the Denver Pacific Railway and Telegraph Company, and the Kansas Pacific Railway Company, and various individuals mentioned, presents a question of the jurisdiction of this court arising under the act of 1875, and especially that branch of it which concerns the removal of cases from state to federal courts. The construction of this statute, in various respects, has been very largely the subject matter of my consideration and action on the circuit during this spring and summer.

It was very aptly remarked here, in the course of the argument on the motion to remand this case to the state court, that the act was intended and was understood to have been passed for the purpose of developing substantially all the judicial powers which the constitution conferred upon the government of the United States. The constitution, while it declares to what the judicial power of the government shall extend, created no court except the supreme court of the United States; and it declared in no manner where that jurisdiction should be vested, except that the supreme court of the United States should have a certain class, which was as to the original jurisdiction very limited, and as to appellate jurisdiction was to be regulated in such manner as congress might determine. It was therefore necessary, for the exercise of all jurisdiction, except that which was directly

Arapahoe County v. Kansas Pacific Railway Co.

conferred upon the supreme court of the United States, that some action of congress should create courts in which that jurisdiction should be vested. Congress has created these courts, and it has from time to time made various declarations of what their jurisdiction shall be. The original act of 1789 (called the judiciary act, for the reason that it did attempt and was intended to create courts and invest them with so much of this jurisdiction as in the wisdom of congress ought to be exercised at that time), did not fill the measure of the judicial power of the federal government. The main body of this as to original jurisdiction was vested in the district courts and circuit courts. That of the district courts was confined in a large measure to criminal jurisdiction of the federal power, with an exclusive jurisdiction in admiralty cases. To this has since been added exclusive jurisdiction in bankruptcy. The circuit court, however, was the main depository of the power as regards the original jurisdiction of the federal courts. But all of the power which congress might have conferred on these courts, either separate or united, was not developed. They specified a limited class of cases, and for the purposes of this suit I may say that the main source of the jurisdiction of the circuit court of the United States was originally contests between citizens of different states, as it is to-day. Congress provided two modes by which jurisdiction might be exercised in the circuit courts of the United States; one by a suit brought there, and in which it was necessary in the declaration, or petition, or bill by which the suit was instituted, to describe the citizenship of the parties, so that the court could recognize that it had jurisdiction of the case. In the construction of that statute the supreme court of the United States decided, in the case of *Cohens v. Virginia*, 6 Wheaton, 264, and has always adhered to this to the present time, that, in bringing suit by original process in the circuit court of the United States, all the parties plaintiff and defendant must have the required citizenship—to be more explicit, that all of the parties plaintiff must be citizens of a state or states different from all and each of the parties defendant, and that if either of the parties plain-

Arapahoe County v. Kansas Pacific Railway Co.

tiff and either of the parties defendant were citizens of the same state the jurisdiction failed. That has been the uniform construction of the act of congress upon the subject.

There was another mode by which the circuit courts acquired jurisdiction of cases, which has been called the original jurisdiction, because it does not fall within the ground of appellate jurisdiction, and this is by removal of cases brought in the state courts of which the state courts had concurrent jurisdiction with the courts of the United States. If a suit was brought in a state court, which, in the arrangement of parties as plaintiffs and defendants, might with equal jurisdiction have been brought in the circuit court of the United States, the act of 1789 provided for a removal of that suit to the circuit court of the United States, upon the application of the party who was not a citizen of the state where the suit was brought. The terms and time and manner of removal were limited. That act remained unrepealed and without substantial modification for a great many years. But about the time of the late civil war in this country it became the policy of congress to enable parties, citizens of different states, for reasons readily imagined, to remove a class of cases not included in the original act, and to remove them at times and under circumstances which could not be done under that act; and from that date to 1875 the statute has been undergoing continual modification and changes. The final act is the one under which the removal is sought in this case from the state court of Arapahoe county, Colorado, into this court.

The suit in this case is brought, as the parties concede, and as the petition shows, by the commissioners of the county of Arapahoe, who are citizens of the state of Colorado, against the Denver Pacific Railway and Telegraph Company, which is also a citizen of Colorado, and against two gentlemen, Mr. Sayre and Mr. Moffat, who are citizens of Colorado, and against seven or eight other persons, who are citizens of other states than Colorado. The case has been removed to this court upon a petition setting forth substantially these facts, and it is now asked to be remanded because the requisite essentials, as prescribed by the

Arapahoe County v. Kansas Pacific Railway Co.

act of congress conferring jurisdiction upon this court, are not found in this case. The objection is that the Denver Pacific Railway and Telegraph Company, Sayre and Moffat, are citizens of the same state with the complainants in this action. This objection, as before stated, has always been considered decisive against the jurisdiction of this court. Where the complainant and defendant are both citizens of the same state, this court has no jurisdiction. It is further alleged, in support of the objection to the jurisdiction of this court in this case, that the Denver Pacific Railway Company, and Sayre and Moffat, each of them, are *necessary* adverse parties to the complainants in this suit. The objection, if well taken, will require the suit to be remanded.

The reply is that the Denver Pacific Company, and Sayre and Moffat, are nominal parties, against whom no relief is sought, and against whom no decree can be rendered; that the bill is clear and specific on that point; consequently the right which belongs to the other parties to remove the case is not and cannot be defeated by the joinder in the petition of other defendants, citizens of the same state with the complainants, against whom no relief is prayed. As regards Sayre and Moffat, the case seems very clear. A careful reading of the bill shows that no relief can be had against them. No case is made in the bill against them, nor does it appear that any was intended to be made. They are carefully distinguished from the other trustees against whom the relief is asked. No relief is asked against the corporation of which they are directors, nor is the relief asked against all the directors of the road. Not only so, but the complainants are very careful to show in their bill that there is no cause of action, or anything asked against these two directors. The charges are against the *majority* of the board of trustees of the Denver Pacific Railway Company; the decree asked is a decree *in personam* against the majority of the trustees, and not against the whole board. It is perfectly clear that no possible decree can be had, nor any charge of misconduct or maladministration be sustained, against Sayre and Moffat, as noth-

Arapahoe County v. Kansas Pacific Railway Co.

ing is alleged against them. They are, therefore, entirely immaterial parties, and may be regarded as out of the case.

The supreme court has decided that where there are merely formal parties, without the requisite citizenship, that does not oust the jurisdiction. But in this case they are hardly formal parties, and it is hard to see why they were put into the bill at all; for it charges that they protested against the wrong while it was being done.

It would be a very dangerous doctrine, one utterly destructive of the rights which a man has to go into the federal courts on account of his citizenship, if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, and with the express declaration that he asks no relief from them, join persons who have not the requisite citizenship, and thereby destroy the rights of the parties in federal courts.

We must, therefore, be astute not to permit devices to become successful which are used for the very purpose of destroying that right. In this case there is no question but that these two gentlemen—Sayre and Moffat—are in no sense in the way of the removal of the case, though they be citizens of the same state as the complainant.

The case then rests upon the question of whether the fact that the Denver Pacific Railway Company is a party defendant, and is a citizen of the same state of the party plaintiff, ousts the jurisdiction of this court or defeats the right of removal of the other parties who are citizens of other states. That question does not rest upon the same principle as the case of Messrs. Sayre and Moffat. The Denver Pacific Railway Company is a necessary party to this suit; it is one without which the suit cannot proceed. The main object of this suit, aside from obtaining a temporary injunction, and the appointment of a receiver, is to obtain an accounting with the Kansas Pacific Railway Company and other defendants, on an allegation that a majority of the trustees of the Denver Pacific Railway Company have been committing frauds, and thus depriving that company of the funds belonging to it. The relief sought is an accounting, and

Arapahoe County v. Kansas Pacific Railway Co.

the relief asked is a decree in favor of the Denver Pacific Railway Company for the amount found due upon that accounting. The Denver Pacific Railway Company is a necessary party to that accounting. A party cannot be required to go to all the trouble of accounting and having a decree, when that accounting and decree will not be a valid defence against the principal party having the right to call such party to account. If the suit was merely between the county commissioners and these trustees, the decree would not protect the trustees, whether they were decreed to pay over moneys, or whether they were discharged or acquitted. It would be no protection against the Denver Pacific Railway Company in another suit upon the same cause of action. This shows very clearly that the Denver Pacific Railway Company is not a mere nominal party, but is an indispensable party. But, as already stated, the main relief sought in this case will be, if the suit is successful, a decree in favor of the Denver Pacific Railway Company for the amount found due from the other defendants in this case. That is an important and significant feature of the transaction. In an action at law a suit could not be maintained in which the board of commissioners of Arapahoe county should be plaintiffs, and the Denver Pacific Railway Company and these petitioners defendants, in which a judgment should be asked for one hundred thousand dollars in favor of the Denver Pacific Company against itself and its co-defendants. The court would say, you cannot make two defendants litigate before a jury and get a verdict as between themselves, while the party who brought the suit looks on as having no interest in the transactions. But the flexibility of the mode of proceedings in a court of chancery is such that, for the attainment of justice, you may, in some instances, where the party is not before the court, make him a defendant, when he will not be a plaintiff. You cannot compel him to hazard the results of a defeat, though his presence in the court may be necessary for the rights of somebody else, and his rights be with the plaintiff in the case. In suits at common law he would be there as plaintiff, if there at all. By the rules and practice in

Arapahoe County v. Kansas Pacific Railway Co.

equity the court allows him to be defendant in the case; but the mere fact that he is placed as defendant instead of plaintiff in a suit in chancery, never changes his relation to the controversy in the case, and it is very clear that the interest of the Denver Pacific Railway Company is the interest of the plaintiffs; that their interest is identical—that the board of county commissioners are using the name of the Denver Pacific Company to carry on this suit solely for the benefit of that company. The Denver Pacific Company, being in the control of the defendants, refused to bring this suit, and the complainants, stockholders of that company, were of necessity compelled to make it defendant, that it might be brought before the court; but when before the court, the company is entitled to recover against the other defendants. The complainants recognize this themselves, for in their prayer for relief they say expressly what they pray for is a decree in favor of the Denver Pacific Railway Company against the Kansas Pacific Railway Company and the other defendants. Now, the controversy in this case is one in which the commissioners of Arapahoe county and the Denver Pacific Railway Company are on one side, citizens of the state of Colorado, against all the other defendants. And all the other defendants are citizens of other states, except Sayre and Moffat, and the controversy, in the language of the constitution and of the statutes, is one between citizens of the state of Colorado and citizens of other states, and therefore within the meaning of the constitution of the United States, and within the meaning of the statute under which this removal is sought. The statute says, in the second section, “that any suit of a civil nature, at law or equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state, claiming lands under grants of differ-

Arapahoe County v. Kansas Pacific Railway Co.

ent states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district; and when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can fully be determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district."

The best judgment I am able to give is that this is a controversy between citizens of the state of Colorado on one side, and citizens of other states on the other side, and is properly subject to removal.

Another objection, and the last one taken in the argument, was, that all of the parties defendant, who are citizens of other states, have not united in asking this removal, and that it requires the union of all these parties in the request that it should be done. The decisions of the courts were that, under the former statutes, it did require all the defendants, or the parties who were classed on the same side as regards citizenship, to unite in the petition for removal, or the suit could not be removed. But the act of 1875 intended to make a different rule upon the subject, and, in my judgment, it was the purpose and intent of the last clause of that act to enable one man, where all the parties on his side of the controversy had such citizenship as to authorize a removal, to have the case removed, and with it to carry all other parties. The language of the statute on that subject is very clear: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states"—which is so in this case—"and which can be fully determined as between them, then either one or more of the plaintiffs or defendants"—not all of them—"actually interested in such controversy may remove said suit." The argument is, that where less than the whole number on the same side made application, it could be removed as to them only, if they had a separate or special interest which could be determined between

Life Insurance Company v. Overholt. •

them and the plaintiffs. But it is the suit that is intended to be removed under this clause, and congress provided that one plaintiff or one defendant could remove the suit. I have decided that the act of 1867, concerning prejudice, remains in full force. The reason is, that the act of 1875 does not repeal all acts on the same subject, but only such as are in conflict. It is very guarded. It is not in conflict with the provisions of this act that one of the defendants may, under the act of 1866, remove the cause as to himself. They are supplementary rights. To say that, where the case can be removed as a whole, it should be removed, but where, from its essential nature, it cannot be removed as a whole, and a part can be removed, that part shall be removed, is not in conflict; so that the two statutes stand together, and are not in conflict, just as I held under the act of 1867. In all cases of removal under the act of 1875, application must be made at the first term, or before the term at which the suit could be tried or heard. No such provision is made in the act of 1867, or in that of 1866.

I am, therefore, of the opinion that the fair construction of the act, taken in connection with the general policy of the statute to give very nearly all the jurisdiction which the constitution of the United States intended to belong to the federal judicial power, requires that this case shall remain where it is; and the motion to remand it is denied.

MOTION DENIED.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
v. OVERHOLT.

1. The rule that a contract shall be judged by the law of the place in which it is made is not applicable to real estate, which can be conveyed only according to the law of the place in which it is situated.
2. The statute of the late territory of Colorado provided that foreign corporations should file a copy of the charter, or other evidence of their incorporation, within thirty days after commencing business in the territory, but contained nothing to indicate that this was a con-

• Life Insurance Company v. Overholt.

dition on which they might continue in business. But it did provide a penalty against the officers for a failure to file such evidence: *Held*, that, though the complainant had failed to comply with the statute in respect to such filing, it was yet capable of taking a mortgage on real estate in the late territory, and that no prohibition to continue in business could be implied from these enactments.

(Before HALLETT, J.)

Conflict of Laws.—Power of Corporations to take Mortgages in other States.—Statute of Colorado Construed.

BILL to foreclose a mortgage given to plaintiff by defendants, April 14th, 1874, to secure a bond for \$2,000, given by one Abraham to plaintiff, payable in five years. The bond has become due by reason of a default in the payment of interest. Other facts are in the agreed statement.

Frederick W. Pitkin, for the complainant.

Symes & Decker, for the defendants.

HALLETT, J.—The mortgagee is a foreign corporation, which had not, at the date of the mortgage, filed a copy of its charter in the office of the county clerk, as required by the act of 1868 (Rev. Stats. 1868, p. 150). The company had then been doing business in the territory for more than thirty days, and the question is whether the omission to comply with the act makes void the mortgage.

Plaintiff claims that the contract was made in Wisconsin, and is for that reason subject only to the law of that state. But the fact is that the bond and mortgage were executed and delivered in this state; and the circumstance that the negotiation for the loan was with the officers of the company in Milwaukee, apparently by mail, is not controlling. The *situs* of the contract, and the place of payment named in the bond, are, however, of little weight in determining the question presented, for, without capacity in the plaintiff to take and hold real property in this state, the mortgage must be void. The rule that a contract shall

Life Insurance Company v. Overholt.

be judged by the law of the place in which it is made, is not applicable to real estate, which can be conveyed only according to the law of the place in which it is situated. (Story's Conflict, sec. 430.) Whether the mortgage was made in Wisconsin or here, the plaintiff cannot take anything by it if it was incapable of holding real estate under our law. In this particular the contract will be tested by the law of this state, wherever it may have been made, for the plaintiff could do nothing with this property except by the permission of the local government. (*Paul v. Virginia*, 8 Wall. 168.) If, then, the statute prohibited the company from doing business in the territory until the charter of incorporation should be filed, we cannot doubt as to the effect of it, but such prohibition should appear with reasonable certainty. It cannot be assumed that the legislature intended more than is expressed, and I cannot find in the act any prohibitory words whatever. Recognizing the existence of foreign corporations, and their right to do business in the territory, the legislature requires them to file a copy of the charter, or other evidence of incorporation, within a period of thirty days after commencing business; but there is nothing to indicate that this is a condition on which corporations may continue in business. On the contrary, a penalty is given, which was probably thought to be sufficient to secure a proper observance of the act. In the possible case, of which this may be an illustration, where a corporation may do business without an officer or agent in the state, the punishment would fail; but this will not authorize the addition of another penalty to that which is prescribed. The language of the act is in marked contrast with others which have been regarded as establishing conditions on which foreign corporations may do business.

In Oregon, corporations must comply with the act *before* doing business in the state, and there is no way of enforcing the command except that of holding contracts, made in defiance of the act, to be void. (*In re Comstock*, 3 Sawyer, 218; *Oregon Investment Company v. Rathburn*, 10 Chicago Legal News, 58.) In Illinois, it is *not lawful* to make contracts until the act has been

Trinidad National Bank v. Denver National Bank.

obeyed. (*Cincinnati Mutual Company v. Rosenthal*, 55 Ill. 85.) Our act does not go so far, but merely enjoins a duty, and punishes disobedience to its command—not by avoiding the contracts of the company, but by holding its officers, agents, and stockholders liable for such contracts. It is as if the company had been required, under a penalty, to publish a statement of assets, or a list of its officers, for the information of the public, and had *failed therein*. No one would contend that the company, by such failure, had become incapable of making contracts, although it had, in fact, violated the law.

The decree must be for the plaintiff.

DECREE ACCORDINGLY.

THE FIRST NATIONAL BANK OF TRINIDAD, COLORADO, v.
THE FIRST NATIONAL BANK OF DENVER.

1. A bank which acts as the collecting agent of another bank must use reasonable diligence and care, and if, in consequence of a failure to do so, a loss happens, it is liable.
2. The defendant bank received from the plaintiff bank a sight draft for collection, drawn by the plaintiff on a third bank against funds actually to the credit of the drawer; the defendant received this draft for collection January 10th, and transmitted it *directly* to the drawee, its correspondent, on the same day; it ought to have reached the drawee in two days; the drawee continued good until January 29th, when it failed; the drawee did not acknowledge the receipt of the draft, and in fact the draft miscarried and never reached the drawee; the defendant made no inquiries about it until February 9th; the plaintiff and defendant both supposed, meanwhile, that it had been paid; the defendant gave the plaintiff no notice of any kind in respect of the draft until February 11th; the plaintiff sued the defendant for its negligent omission to give it notice: *Held*, that the defendant was liable: *Held*, also, that the usage or custom set up by the defendant, to the effect that it was not required to make inquiries concerning such remittances prior to the receipt of the regular monthly statement of accounts between banks, was not established by the evidence.
3. Under the special facts, the measure of damages was the amount of the draft.

Trinidad National Bank v. Denver National Bank.

(Before DILLON, Circuit Judge.)

Duty and Responsibility of a Bank as a Collecting Agent.—Negligence.— Usage.— Custom.— Measure of Damages.

ON the day of its date, the plaintiff bank drew the following:

“\$5,000.

TRINIDAD, COL., Jan. 9, 1878.

“Pay to the order of D. H. Moffat, cashier [of defendant bank], five thousand dollars.

“GEO. R. SWALLOW, *Cashier.*

“*To the First National Bank, Kansas City, Mo.*”

The plaintiff was the correspondent of the defendant bank, and both were the correspondents of the above named bank at Kansas City. Defendant (to the order of whose cashier the draft was payable) received the same, in due course of mail, January 10th, and without delay transmitted it on the same day, for credit and advice, *directly* to the drawee—the Kansas City bank. When the draft was drawn by the plaintiff it had more than the amount actually on deposit with the Kansas City bank, and it at once credited the last named bank with the amount. According to usage, the defendant, on the receipt of the draft, credited, January 10th, the amount to the plaintiff and charged the amount to the Kansas City bank. This was done in anticipation that the draft would reach the drawee and be duly paid when it arrived. The letter containing the draft which was sent by the defendant to the Kansas City bank would, in due course of mail, have reached the drawee on January 13th, at the latest on January 14th. The Kansas City bank never received the letter containing the draft. That bank continued to do business until January 29th, 1878, when it closed its doors, and afterwards the comptroller of the currency appointed a receiver, and the bank is now in process of liquidation. If the draft had been presented at any time before January 29th, it would have been paid. The Kansas City bank did not, of course, acknowledge the receipt of the draft, since its president testified that it was never received. Singularly enough, another draft for \$5,000,

Trinidad National Bank v. Denver National Bank.

drawn about the same time by the plaintiff on the same Kansas City bank, and forwarded for collection through a bank in Pueblo, Colorado, was never received by the Kansas City bank—so its officers testify.

The defendant bank made no inquiries prior to February 9th, 1878, concerning the draft here in question, or why the receipt of it had not been acknowledged by the Kansas City bank. The defendant's officers assumed that it had been received and credited, until February 9th, when, on receiving the monthly statement, or account current, of the Kansas City bank, it learned therefrom that it was not credited with the draft in question. The defendant immediately (February 9th) telegraphed the Kansas City bank that it had, on January 10th, transmitted the draft, which did not appear in their statement just received. On February 10th, the Kansas City bank wrote the defendant that it had never received the remittance. This letter being received by the defendant February 11th, the defendant at once, on that day, notified the plaintiff and charged back the amount to it. Until this, the plaintiff supposed the draft had been paid. The plaintiff objected to the defendant charging back the amount, but the defendant insisted, and refused, upon demand, to restore the credit, or to pay the amount to the plaintiff.

The plaintiff's action is against the defendant to recover the amount, and is based upon the *defendant's alleged negligence, as the agent of the plaintiff*, in omitting to give the plaintiff notice that the draft had not been credited or received prior to the failure of the drawee. The defendant denies the imputed negligence, and sets up, in its answer, a custom or usage among the banks in Colorado, to the effect that in transmitting bank checks and drafts to correspondents, on whom they are drawn, it was usual and customary to await, for advices, the regular and usual monthly statement, and that such custom or usage did not require the defendant to make any inquiries concerning such remittances prior to the receipt of the regular monthly statement.

Trinidad National Bank v. Denver National Bank.

The replication denies the existence of any such custom or usage, or any knowledge thereof, by the plaintiff.

A jury was waived, and on the trial to the court the facts appeared substantially as above set forth.

Wells, Smith, & Macon, for the plaintiff.

Sayre, Butler, & Wright, for the defendant.

DILLON, *Circuit Judge*.—The plaintiff treats the defendant as its agent to collect the draft in question, and the ground of the action is the alleged negligent omission of duty on the part of the defendant, resulting in loss to the plaintiff. I have fully examined the adjudged cases relating to the duty and responsibility of a bank which undertakes to act as a collecting agent for its customers, or for other banks. They clearly show that the defendant bank ought to have ascertained, within a reasonable time, whether the draft transmitted had been received by its correspondent; and if not, to have advised the plaintiff thereof. The practice of banks to send such checks or drafts *directly to the drawee* (as in this case), is attended with some obvious additional peril, and does not weaken, if, indeed, it does not increase, the diligence required of the collecting bank in respect to inquiry and notice. The defendant bank allowed an unreasonable time to elapse before it made inquiry concerning the draft, and more than a reasonable time had elapsed before the failure of the Kansas City bank occurred. It was this negligence that caused the loss, since it is established by the evidence that the draft would have been paid if it had been presented at any time before the suspension of the drawee, on the 29th day of January. Here, then, was an unexcused delay for fifteen or sixteen days to make any inquiry, or to give any notice. Aside from the custom or usage pleaded in defence, to be noticed presently, the decisions in England and in this country are uniform, that such delay to make inquiry, and omission to notify the party interested, as occurred in this case, impose a liability, if loss is thereby occasioned.

Trinidad National Bank v. Denver National Bank.

The alleged custom or usage, in derogation of the otherwise legal rights of the plaintiff, is one which scarcely seems consistent with reasonable vigilance, or the well known practice of business men and banks, to acknowledge promptly the receipt of money remittances. The evidence in this case showed that it was the uniform practice to make such acknowledgments. The defendant claimed that all the banks in Denver and Colorado relied on the monthly statements, and that it was not customary or usual to inquire after remittances in the *interim* between monthly statements. The evidence failed to show any such custom or usage common to all, or even to the majority, of the banks in Denver. In fact, it failed to show that there was any such uniform usage in the defendant bank, whose business seems to be well regulated. The cashier of the defendant frankly testifies that, if his attention had been called to the fact that no letter of advice had been received, in due course, from the drawee, he would have made inquiries. At all events, the usage of the defendant was, at most, its private usage or mode of doing business. It was not known to the plaintiff, and if it was invariably adhered to by the defendant, it was of such a nature that the plaintiff was not bound to take notice of it. It was shown in evidence that the defendant bank did a very extensive business; and it was claimed by the cashier, on the witness stand, that it was impracticable to look after all the paper sent forward to correspondents for credit in the interval between the transmission of such paper and the receipt of the monthly statement. But the evidence did not sustain this claim. On the contrary, it showed that banks in general were in the habit of so keeping their books as to have their attention called to a failure to receive advices, in order that they might institute the needful inquiries, and that it was the usual practice to make such inquiries unless upon the eve of the time when the monthly statement was due. The fact that the defendant transacts a large business cannot relieve it from the duty of giving due attention to every piece of paper it undertakes to collect. The measure of diligence cannot fluctuate with the amount of business which a given

Trinidad National Bank v. Denver National Bank.

bank may do. And the defendant would not, perhaps, like to be discharged from liability on the ground, judicially declared, that it was not bound to the same degree of care as smaller banks, in transacting the business of its correspondents. I consider the liability of the defendant beyond any reasonable doubt.

Under the circumstances, I regard the rule of damages as equally clear. The plaintiff had more than the amount actually on deposit, subject to draft, in the Kansas City bank. The draft would have been paid if it had been presented in time; if plaintiff had been notified within a reasonable time that the draft had miscarried, it could have protected itself against loss. The Kansas City bank has failed. There was no evidence what dividend, if any, its creditors will receive. The draft in question was drawn in favor of the defendant, and it had, and has, the legal title thereto. The plaintiff, when it drew the draft, credited it to the drawee and charged it to the defendant, and received in turn credit from the defendant therefor. The defendant having the legal title to the draft, will be entitled to prove it as a lost instrument against the Kansas City bank, and to receive all dividends which may be declared. Under these circumstances, the defendant is liable for the full amount of the draft, and will be entitled to hold the draft as its own, or to have a duplicate if it desires. There is no other practicable rule of damages in the posture in which the case stands, and this rule cannot fail to measure the exact loss which may eventually ensue.

JUDGMENT FOR PLAINTIFF.

REPORTS OF CASES DETERMINED

IN THE

Circuit Court of the United States,

FOR THE

DISTRICT OF NEBRASKA.

THE UNITED STATES v. THE BURLINGTON AND MISSOURI
RIVER RAILROAD COMPANY IN NEBRASKA.

1. There are no *lateral* limits to the grant of lands made by Congress (13 Stats. at Large, 356, sec. 19) to the defendant company; in this respect differing from other grants mentioned.
2. What lands are embraced in the description of the grant as being "*on the line*" of the said road defined, and the language held to mean that the lands shall be taken along a line parallel to the general direction of the road, on each side of it, and within lines perpendicular to its terminus at each end.
3. By the grant the company was entitled to patents for the lands earned "*on the completion of any consecutive twenty miles*" of its road: *Held*, that the company was not bound to apply for, or receive, its patents by sections of twenty miles as soon as completed, but might await the final completion of the road, and get all its lands at the same time. *Held*, also, patents will not be set aside where they represent only what the company was entitled to, even if they were issued too soon—the road being completed, and no injury having resulted to the government.
4. Construing the alleged conflicting grants to the defendant company, and the Union Pacific Railroad Company: *Held*, that the land department correctly decided that the title of the Union Pacific Railroad Company to lands within twenty miles of its road was paramount to the title of the defendant company.

United States v. Burlington and Missouri Railroad Co.

5. There was no authority in the grant to issue patents for land on the north side of the defendant's road, in lieu of lands deficient on the south side of its road, and such patents are void. But, in a bill to have such patents declared null, the lands must be described or identified.

(Before MILLER, Circuit Justice.)

Land Grant to the Defendant Company, and to the Union Pacific Company, Construed.—Conflict.—Limits and Extent of Grant.—Annulling Patent by Judicial Decree.

THIS case came before Mr. Justice MILLER, in January, 1876, on a demurrer to a bill in equity, filed on behalf of the United States by the district attorney. The object of the bill is to have a declaration of the nullity, in whole or in part, of several patents of lands, issued to the defendant under section 19 of the act of July 2d, 1864, which was an act to amend the act "to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same, for postal, military, and other purposes," approved July 1st, 1862. (13 Stats. at Large, 356.) The questions made, and the facts on which they arose, appear in the opinion.

Mr. Neville, United States district attorney, for the plaintiff.

Mr. Woolworth, for the defendant.

MILLER, *Circuit Justice*.—This case comes before me on a demurrer to a bill in equity, filed on behalf of the United States by the district attorney. The object of the bill is to have a declaration of the nullity, in whole or in part, of several patents for lands, issued to the defendant under section 19 of the act of July 2d, 1864, which was an act to amend the act "to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same, for postal, military, and other purposes," approved July 1st, 1862. (13 Stats. at Large, 356.)

United States v. Burlington and Missouri Railroad Co.

The 18th section of this amendatory act of 1864 grants to the Burlington and Missouri River Railroad Company, an existing corporation under the laws of Iowa, the right of way, and the use of adjacent lands for earth, stone, timber, etc., through the territory of Nebraska, from the point on the Missouri river, south of the mouth of the Platte river, where it may choose to cross, to an intersection with the main track of the Union Pacific Railroad, not further west than the one-hundredth meridian of longitude.

Section 19, out of the construction of which the suit mainly arises, is here given *verbatim*: "*Be it further enacted*, That, for the purpose of aiding in the construction of said road, there be, and hereby is, granted to said Burlington and Missouri River Railroad Company *every alternate section* of public lands (excepting mineral land, as reserved by this act), designated by odd numbers, *to the amount of ten sections per mile on each side of said road, on the line thereof*, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, That said company shall accept this grant within one year from the passage of this act, by filing said acceptance with the secretary of the interior, and shall also establish the line of said road, and file a map thereof with the secretary of the interior, within one year from the date of said acceptance, when said secretary shall withdraw the lands mentioned in this grant from market."

1. The first question arising in the case comes out of the construction of this section asserted in the bill, that no lands are granted by this act outside of the lateral limit of twenty miles on each side of the road.

It is very difficult to perceive on what principles this construction can be maintained; no lateral limit is mentioned, nor any twenty miles. The grant is one of amount or quantity, and that quantity is to be had, subject alone to these restrictions: 1. The sections can only be of odd numbers. 2. They must be limited to ten per mile on each side of the road. 3. They must

United States v. Burlington and Missouri Railroad Co.

be on the line of the road. 4. They must be of lands not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or a homestead claim had not attached at the time the road was definitely located. There is no limitation by any lateral line. As it was very well known that the road must run through the most settled part of Nebraska, and that much of the land along its line was already disposed of, and that, within the two years allowed for the definite location of the road, much more of it would be claimed under homestead and pre-emption laws, it was clear to the framers of the act that the company could not get the amount of ten alternate sections on each side of the road, within a limit of twenty miles.

If it be said that all other grants, and especially the other grants of lands to the Pacific railroads, in the original and amended acts, have their lateral limits, we answer that the difference in the phraseology of the grant, and other circumstances, show an intention not to limit it in this case.

There is, probably, no railroad grant to be found within those lateral limits, when the grant is of any "amount" or "number of odd sections." The phrase is always every alternate odd, or even, section within certain limits, and congress generally gives an indemnity on such of these sections as have been reserved or disposed of, by express language authorizing them to be selected elsewhere outside the limit. What is still more significant, is, that in this very act of 1864, the original grant of 1862 to the Union Pacific Company is increased from five sections on each side of the road to ten, and the existence of lateral limits of the original act is mentioned, but enlarged to twenty miles only on each side, to meet the increased number of sections granted. The 17th section of this act also grants to a corporation, thereafter to be organized, to build a road from Sioux City, in Iowa, to a junction with the Union Pacific, the same number of alternate sections of land for *ten miles in width*, on each side of the road. We are forced to the conclusion that when, after enlarging the limit of the original grant to the main road by section 4 of this act, and on granting to a new company lands to build the Sioux

United States v. Burlington and Missouri Railroad Co.

City branch by section 17, in both of which the lands were to be found within a certain limit, congress made this grant of a certain amount of such lands without such limit, it was intentional and of a purpose. (13 Stats. at Large, 356.) The reason for this difference is also clear. For all the branches of the road mentioned in the act of 1862, of which the Sioux City branch was one, and the Burlington and Missouri River was not, there was a large subsidy of bonds of the United States, per mile, in addition to the lands granted by congress. But when, two years afterwards, that body authorized the Burlington and Missouri River Railroad Company to extend its road to a junction with the main road through Nebraska, and parallel, or nearly so, to this main road, it did not choose to give that company any bonds or money. And for this reason, as well as because such a large part of land had already been disposed of within a limit of twenty miles, it was deemed a reasonable measure of equalizing the donations to permit the whole amount of ten sections on each side of the road to be taken, if they could be found, without any lateral restriction.

2. The next allegation of the bill demanding attention, is, that a large number of the sections, or parts of sections, of land included in these patents, lie some fifty or a hundred miles distant from the road, and do not come within the description of the grant, as being "on the line thereof."

It is extremely difficult to fix any very precise meaning to this phrase. It is used in reference to the grant to the Union Pacific Company, in connection with the twenty-mile limit. It cannot, therefore, mean contiguous to the road-bed, or to the land taken for the road-bed, as a section of land twenty miles distant from the road-bed is clearly within the grant. If twenty miles distant is on the line, what limit in a lateral direction can you say is not? The equivalent phrase in the grant to the Sioux City branch is, "on each side of the same, along the whole length of said road." The line of the road seems here to be used for the course or direction of the road, and along its whole length means probably parallel with its course, and between its termini. And

United States v. Burlington and Missouri Railroad Co.

this is what I suppose is really meant: that the land shall be taken along, or parallel to, the general direction of the road, on each side of it, and within lines perpendicular to its terminus at each end.

3. The next section of this act, to-wit, section 20, provides, that when any consecutive twenty miles of the road has been completed, and this shall be made to appear to the president, "patents shall issue, conveying the right and title to said lands to said company, on each side of said road, as far as the same is completed, to the amount aforesaid." And the bill insists that, when a patent issues for any section of twenty miles, no land could lawfully be included which did not lie parallel to that twenty miles, and within lines drawn perpendicular to each end of that twenty miles. It then alleges that this rule was disregarded, and large numbers of sections were included in the patents issued on the completion of every section of twenty miles, which lay east or west of the terminus of those sections, the road running nearly east and west.

It may be conceded that when the company presented its claim for the lands it was entitled to by reason of the completion of any specified section of twenty miles, they were only entitled to lands parallel to that section, and not either east or west of its respective termini, but they were neither bound to apply for, or receive, their patents by sections of twenty miles. It was optional with the company to await the final completion of the road, and get all the lands to which they would have been entitled at the same time. What would they have been? Obviously, ten sections on each side of the whole length of the road, without regard to the section of twenty miles. Or, if the full quantity was not found on each twenty-mile section, when applied for in sections, within the limits of that sub-division, a patent might have been taken for what could be so found, and the remainder would be due to the company when the road was finished. If, then, the patents, as they now stand, only represent what the company was entitled to on the completion of the road, I think the error, if there was one, in issuing them too soon, does not require that they should

United States v. Burlington and Missouri Railroad Co.

be set aside, since the road has now been completed for two or three years, and no possible injury can result to the United States.

If my construction of the 19th section, and of the amendatory act, is sound, the defendant has received no more lands than it was entitled to by the mistake of the commissioners, or any other lands than what it would have had if it had received its patent for the whole after the road was finished. If these patents were set aside, the company could now ask that the same lands be re-patented to it.

4. The road of the defendant and the road of the Union Pacific Company run for many miles parallel to each other, and so near as to be within twenty miles of each other, on the south side of the road of the latter company.

In the selection of lands for the defendant company, the department of the interior refused to permit it to take any lands within the twenty miles on each side of the Union Pacific road, on the ground that the right of that company to the alternate odd sections, within that limit, was paramount to that of the Burlington and Missouri River Railroad Company. Thus, a strip of forty miles in width, on the north of the road of the defendant, was excluded from its selection. The bill before me now alleges that this was all wrong. That, first, the track of the Union Pacific had no grant at all of lands; and, secondly, if it had, it was only by the act of 1864, made at the same time with the grant to defendant, and, therefore, their rights were equal when the roads brought them in conflict.

The act of 1862 created a corporation called the Union Pacific Railroad Company, and authorized this company, and others named in the act, to construct a single line of road from the one-hundredth meridian of west longitude toward the Pacific ocean, with three branches from this meridian eastward. One of these branches was to commence on the western boundary of Iowa, at such a point as the president should select, and thence to join the main road at the one-hundredth meridian. Specific grants of so much in bonds for each mile, and for so much land for each mile, were made to all these roads by the same act. Section 3 of the

United States v. Burlington and Missouri Railroad Co.

act, speaking of the Union Pacific, declares that there is hereby granted to said company, for the purpose of assisting in the construction of said railroad and telegraph line, every alternate section of public lands, to the amount of five sections per mile, on each side of said railroad, on the line thereof, and within ten miles on each side of the road. It is argued that, because the Iowa branch is separately described as such, and the road from the one-hundredth meridian of longitude to the western boundary of Nebraska is spoken of by the law as the line of the Union Pacific, no grant is given for the Iowa branch.

But the caption of the act speaks of a road from the Missouri river to the Pacific ocean. The grants are made to build this road, and the branches as parts of it. There is nothing in the act to indicate, and no reason can be given why the lands on each side of the branch should not be given, as well as on the main road and the other branches. If the lands are not given for this branch, neither are the bonds. Yet the president, the secretary of the treasury, and of the interior, and subsequent acts of congress, have all recognized the grant, both of bonds and lands, as extending as well to this branch as to the other parts of the road. I do not doubt that there was such a grant intended, and that intent must control.

The original act, however (12 U. S. Stats. 492, sec. 3), only gave five alternate sections per mile on each side, within a limit of ten miles on each side of the road. By section 4 of the amendatory act of 1864, it is enacted that section 3 of the original act be hereby amended, by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and inserting in lieu thereof the word "twenty." It will be seen, on a comparison of the sections, that, as amended, it is a grant of ten sections on each side of the road, within twenty miles thereof. It is argued by counsel for plaintiff, that, as to the enlarged grant outside of the ten-mile limit, it is made by the same act, and takes effect as of the same date, as the grant to the Burlington and Missouri

United States v. Burlington and Missouri Railroad Co.

River Railroad Company, found in the subsequent section 19, and that where the lines of the road made a lap in which the right of selection conflicts, the alternate odd sections should have been equally divided between the two companies, and that the lands patented to the defendant, in lieu of those to which it was entitled within the limits of this conflict, were so done in violation of the law, and the patents are void. But I am of opinion that the land department correctly decided that the title of the Union Pacific Company, within twenty miles on each side of its road, was paramount and exclusive. Looking to the certainty that in some portions of their lines these roads must, before their connection, run parallel with each other within the twenty-mile limit of the Union Pacific, it seems reasonable that congress, instead of enlarging the grant to this road in general terms, used words which made the amendment a part of the original grant, for the purpose of having it take effect as of the date of that grant. In other words, it incorporates *nunc pro tunc* words which make that grant one for twenty miles on each side of its road. Whether this retrospective character would be given to the amendment, in a case where intervening rights had attached, we need not now decide. Probably it would not, but the Burlington and Missouri River Railroad Company takes its right by the same statute which says that the former act shall read so as to give the Union Pacific the lands now the subject of controversy. This view would commend itself to congress by its intrinsic equity, for by it each road gets the largest quantity of land which the statute permits, while the other construction allows the Burlington and Missouri Company to get all it could under any circumstances, the other road losing what the latter took within the lap. This comes out of the fact that the Burlington and Missouri Company was not confined within any lateral limits, while the Union Pacific could not go without its twenty-mile limit to make up deficiencies.

Besides, both of these roads have acquiesced in the construction given and acted on by the United States, the officers of the government having prescribed it as the one which should govern all

United States v. Burlington and Missouri Railroad Co.

their rights, the patents have been issued under it for the full amount of all the land which could be so claimed under both grants, and innocent purchasers have no doubt become owners of much of the land patented to the Union Pacific Company; and it is certainly all mortgaged, so that an incalculable amount of injustice would be done by holding all this void and setting aside the patents. If the patents are not absolutely void, and only voidable, then every principle of equity in the settlement of conflicting and doubtful rights acquiesced in by the parties, is opposed to setting aside these patents at the instance of the United States.

5. There remains one more ground for equitable relief relied on by the bill.

It is alleged that one hundred and fifty thousand acres of land lying on the north side of defendant's road, have been patented in lieu of lands found deficient on the south side of the road, and that the patents so issued are void.

I am of opinion that the act of congress did not intend to grant twenty sections per mile for the road, *but ten sections per mile on each side of the road*—that no right to take more on either side of the road than what amounted to ten sections per mile on that side was conferred. If, for any reason, the required number of sections could not be found on one side, it was as in the case of a similar deficiency in the twenty-mile limit of the other road, a loss which congress had made no provision to supply. There existed, therefore, no power in the office of the land department to issue patents for lands on the north side for those not found on the south side. If the lands so patented can be identified, I think that the government is entitled to have a declaration that as to these the patent conveys no title.

But the bill before me does not so identify them. I find no description of them by congressional sub-division, nor by reference to any patent containing them exclusively, nor by reference to any schedule of them. The court cannot declare all the *patents* issued void because there are *some* lands included in *some* of the patents which there was no right to convey.

Sioux City Railroad v. Union Pacific Railroad.

As the bill stands, the demurrer must be sustained. If, however, the attorney for the United States thinks he can amend so as to identify these lands by specific description, he has leave to do so. If he does this, defendant can either renew his demurrer or answer to that part of the bill. If he renews his demurrer, it may be considered as overruled. If he chooses to abide the demurrer, a decree can go for the plaintiff for the lands so described. If plaintiff abides by his bill as it now stands, it must be dismissed on the demurrer.

Subsequently the district attorney amended the prayer of his bill (being unable to describe the lands specifically) and asked that the company be decreed to re-convey to the United States an equal amount of lands or pay the value of the excess, and to the bill as amended the circuit justice sustained a demurrer, being of opinion that the United States is not entitled to such relief, as neither the specific lands nor their value can be ascertained as a foundation for relief, nor the value of the lands to be re-conveyed.

BILL DISMISSED.

Note.—Construction of land grant to Union Pacific Railroad Company and to the Sioux City branch (12 Stats. at Large, 489, 13 *ib.* 356), see *Sioux City and Pacific Railroad Company v. Union Pacific Railroad Company*, *post*.

SIoux CITY AND PACIFIC RAILROAD COMPANY v. UNION
PACIFIC RAILROAD COMPANY.

Where the land grant of congress to the Union Pacific Railroad Company and the Sioux City branch (12 Stats. at Large, 489, 13 *ib.* 356) conflict, and the limits of the respective grants overlap each other, and lands in the common territory were patented to the two companies jointly, as tenants in common: *Held*, upon a construction of the legislation of congress in this regard, that the patent was rightly issued and that neither company was the exclusive owner of the said lands, and a partition was decreed.

Sioux City Railroad v. Union Pacific Railroad.

(Before DILLON, Circuit Judge.)

Union Pacific Railroad Company.—Construction of its Land Grant and that of the Sioux City Branch.

IN execution of the legislation of congress, whereby the complainant and defendant were granted public lands in aid of the construction of their respective roads, a joint patent was granted on the 25th of March, 1873, of thirty thousand seven hundred and ninety and forty one-hundredths acres of land lying between the ten and twenty-mile limit of the land grant of the defendant, to complainant and defendant. There were also patented jointly to the two companies twenty thousand nine hundred and four acres within the ten-mile limit of the defendant company.

This bill is filed to compel the Union Pacific to convey to the Sioux City and Pacific the one-half of such lands, the latter company claiming all the land embraced in said patents. The cross-bill asks a decree awarding the whole of said lands to the Union Pacific, and that the complainant be compelled to convey accordingly.

It is stipulated that the original and cross suits shall be heard as one; that the admissions of the answers in each shall be taken as true in both, and some further facts are agreed upon as evidence in both causes.

The legislation out of which this controversy springs, are the acts of 1862 and 1864. Section 1, act of 1862 (12 Stats. at Large, 489), empowered the Union Pacific to build a railroad from a point on the one-hundredth meridian of west longitude to the western boundary of Nevada territory. Section 3 granted land in aid of the construction of said road, "to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road." Section 14 authorized the construction of the so-called Sioux City and Iowa branches, "upon the same terms and conditions, in all respects, as are contained in this act for the construction of the railroad and telegraph mentioned." Section 9 contains the grant of bonds and lands to the Leavenworth,

Sioux City Railroad v. Union Pacific Railroad.

Pawnee, and Western Railroad Company, of Kansas, now known as the Kansas Pacific, and to the Central Pacific, of California.

The grants are made in the exact language employed in the grants to the Iowa and Sioux City branches, viz.: they are authorized to build "upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned."

Section 13 places the Hannibal and St. Joseph Railroad Company, of Missouri, in the same position. Section 4, act of 1864 (13 Stats. at Large, 356), amends section 3 of the act of 1862, by doubling the land grant contained in the latter act. Section 17 relieves the Union Pacific from the obligation to build the Sioux City branch, and authorizes its construction by a company to be designated by the president of the United States, "on the same terms and conditions as are provided in this act and the act to which this is an amendment, for the construction of the Union Pacific railroad and telegraph line and branches," except that it shall receive no more bonds than the Union Pacific would have received if it had built the Sioux City branch under the former legislation, but that it should receive alternate sections of land for ten miles in width on each side of the same, *along the whole length of said branch.*

The pleadings and stipulation of facts show that the Union Pacific Company filed their assent to the act of July, 1862, as required by the 7th section of the act. No other assent or acceptance of that act or the act of July 2d, 1864, was required. The location for one hundred miles westward from the Missouri river was made by actually surveying and staking the line, as built upon, in the month of November, 1863, and a map of the location at the time was filed in the interior department, October 24th, 1864, and one hundred miles built in 1865. This map referred to the acts of 1862 and 1864, and contained the statement therein, indorsed by the officers of the Union Pacific Railroad Company, that the "red line on said map is hereby (October 19, 1864) designated as the permanent location of the route of the road for one hundred miles west of its eastern ter-

Sioux City Railroad v. Union Pacific Railroad.

minus." A partial change of the line was made by the company, and approved by the department, in 1865.

The Sioux City and Pacific Railroad Company commenced its corporate existence August 1st, 1864. It was designated by the president to build the Sioux City branch, December, 24th, 1864, and it designated the general route of the road, July 24th, 1865, and built it in 1869.

The lands in controversy lie within one hundred miles of the eastern terminus of the Union Pacific Railroad.

E. S. Bailey and *N. M. Hubbard*, for the Sioux City Railroad Company.

A. J. Poppleton, for the Union Pacific Railroad Company.

DILLON, Circuit Judge.—One of these suits relates to lands *within* the *ten-mile* limit of the land grant of the Union Pacific Railroad Company, and the other to lands *outside* of the *ten-mile* and within the *twenty-mile* limit. The lands are patented to the contesting companies, jointly, as tenants in common. Each company claims for itself the sole and absolute ownership of all the lands. If any portion of the lands are decided to belong to the complainant, it asks a decree to that effect and that partition be made.

1. It is insisted by the Sioux City Company that the Union Pacific Railroad Company has no title *outside* of the *ten-mile* limit of its land grant.

The ground of this claim is that, inasmuch as said lands lie east of the one-hundredth meridian, and along the Iowa branch, the land grant was not, as to said branch, enlarged by the act of 1864, which extended the lateral limits of the grant from ten miles to twenty miles. I am of opinion that the act of 1864, as to bonds and lands, applied as well to the *branches* (including the Iowa branch) as to the main line, or stem of the road. No reason appears for excluding the branches. All were parts of the common scheme or system of roads to connect the Pacific coast with the states at different points on the Missouri river.

Sioux City Railroad v. Union Pacific Railroad.

Such has been the uniform construction of the executive department of the government, and lands have been patented to the Central Pacific, the Kansas Pacific, and other branches of the Pacific system of roads, according to this construction. This construction is right, as the acts of 1862 and 1864, as to the extent of the grant, are to be read and taken together. This court has always acted upon this view, and such would seem to be also the opinion of the supreme court. (*Prescott v. Railroad Company*, 16 Wall. 607.) Besides, the 17th section of the act of 1864, in referring to the "terms and conditions" upon which the Sioux City road is to be built, speaks of them as those "provided in this act (1864), and the act to which this is an amendment, for the construction of the Union Pacific railroad and telegraph line and *branches*." If the act of 1864 made no change as to *branches* in respect to the "terms and conditions" of the grant, why were branches mentioned in that act in this regard?

2. The next ground of exclusive ownership in the Sioux City Company, against the Union Pacific Company, is based upon the words of the proviso in the 17th section of the act of 1864 (this being the section relating to the Sioux City Company), that "said company shall be entitled to receive alternate sections of land, for ten miles in width, along the *whole length of said branch*."

In this connection we may refer also to the claim of the Union Pacific Railroad to the exclusive ownership of the same lands. This claim is based upon two main grounds. The first is, that the grant to the Sioux City Company is provisional and contingent, depending upon the designation by the president of a grantee, etc., whereas its grant is present and certain. Second, it claims that as its line was definitely located before the line of the Sioux City Company, and as its road was actually constructed first, it thereby became entitled to the lands within the limits of the common territory. These conflicting claims depend for their solution upon the construction of section 17 of the act of 1864, amending section 14 of the act of 1862. The act of 1862 re-

Sioux City Railroad v. Union Pacific Railroad.

quired the Sioux City branch to be built by the Union Pacific Company whenever Sioux City should have a completed line of railway to the east. It was to be constructed on the "same terms and conditions" as the Union Pacific Company was to construct its other lines. It was to connect with the Iowa branch, or with the main line not farther west than the one-hundredth meridian. The point of junction was to be fixed by the president. The act of 1864 released the Union Pacific Company from the obligation to construct the Sioux City branch. It empowered the president to designate the state corporation to construct the branch. The line of road was to be the same as before, with the important exception that the *company*, instead of the president, was allowed to "select" the point of junction with the Union Pacific road, and might fix it hundreds of miles *west* of the one-hundredth meridian, if it chose. This important power, if not limited, might be exercised so as to involve the government in a subsidy greatly in excess of that needed to perfect and secure its scheme of roads. To guard against abuse in this respect, the congress had the wisdom to enact, in the form of a *proviso* to restrain the grant, the following: "And the said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under *this act and the act to which this is an amendment*; but said company shall be entitled to receive alternate sections of land, for ten miles in width, on each side of the same, along the whole length of said branch." Now, it is plain that, while the Sioux City branch was constructed under the 17th section of the act of 1864, yet that section is an *amendment* of the 14th section of the act of 1862, in this respect, and is to be construed accordingly; and the Sioux City Company has the same rights as if this branch had been constructed by the Union Pacific Company under the same legislative provisions.

The inception of the grants to both these contesting companies is the same. They are contemporaneous in their origin. They both spring from the same legislation. The right of the one

Sioux City Railroad v. Union Pacific Railroad.

company, as respects the other, does not depend upon priority of location or construction. The special provisions of the proviso limit the subsidy to the Sioux City Company. It might build its road west of the one-hundredth meridian, but it could not get bonds for any greater distance, but it was entitled to receive land for the distance actually built, within lateral limits of ten, instead of twenty miles, on each side of the road. So, by the contemporaneous legislation, the Union Pacific Company was, within the designated lateral limits, entitled to receive land for all the line of road it constructed. It is evident that, as these roads must unite, these limits will conflict, and lands granted will lie in the common territory. This controversy relates to such lands. As the grants are the same in their origin and purpose, and both companies have complied with the conditions, the case is peculiarly one in which *equality is equity*. Such was the view of the land department, and it is the judgment of this court, that neither company is entitled to the exclusive ownership as against the other.

The Sioux City Company bases its claim to exclusive ownership on the words of the proviso — “*along the whole length of said branch.*” The purpose for which these words were used was not to give priority over the main company where the grants might conflict. The whole proviso, taken together, in connection with the other portion of the section, shows that when congress allowed the company to fix its own point of junction, it in effect said: “Yes, you may do this, but only on condition that, if you go west of the one-hundredth meridian, you shall not get any extra bonds, but you may have lands as far as you go, but must take them within lateral limits of ten, instead of twenty miles.”

A decree will be entered that the parties are tenants in common as respects the lands jointly patented, and for a partition if the companies cannot agree upon a division.

DECREE ACCORDINGLY.

NOTE.—This decree was acquiesced in by the parties, who subsequently effected an amicable partition of the lands.

Construction of land grant to the Burlington and Missouri River Railroad Company in Nebraska (13 Stats. at Large, 356, sec. 19), see *United States v. Burlington and Missouri River Railroad Company, ante*.

First National Bank v. Caldwell.

FIRST NATIONAL BANK v. CALDWELL, HAMILTON, & Co.,
and JONAS GISE.

The plaintiff corporation, holding as security from its debtor certain railroad coupons, which were convertible into lands at the option of the holder, and which were so converted, and the deed taken in the name of the debtor, and not recorded, but deposited, in pursuance of an agreement to that effect by the debtor with the plaintiff, as a substituted security in place of the coupons, was held to be an *equitable mortgage*, and to have an equity in the lands obtained for the coupons and embraced in the deed, superior to the lien of a general judgment creditor of the common debtor.

(Before DILLON, Circuit Judge.)

Equitable Mortgage.—Deposit of Title Deeds.—Judgment Lien.

THE bill in this case is filed to establish an equitable lien upon certain lands described therein. The material facts are these: The defendant Gise, January 1st, 1874, made a loan of money from the plaintiff, and, after various payments and renewals, the amount became \$2,500 on July 15th, 1875, evidenced by two notes, payable in sixty and ninety days thereafter. Upon these notes a judgment was recovered by confession in this court, on November 15th, 1875. An execution was thereupon issued on the 20th, and returned on the 23d of November, 1875, no property found.

It appears that Gise, being the owner of certain railroad bonds with coupons attached, *deposited the coupons with the plaintiff, as security for payment of this demand.* These coupons being *convertible into lands at the option of the holder*, by an arrangement between the parties interested, these coupons were withdrawn by Gise, and located by him upon the lands mentioned in the bill, with the agreement between the plaintiff and defendant Gise, that the deed from the railroad company, as soon as obtained, should be deposited, and the lands described therein become security for the payment of the debt in lieu of the coupons.

Gise obtained a deed from the company, which was deposited

First National Bank v. Caldwell.

with plaintiff in pursuance of the agreement of the parties, and this deed is now held by the plaintiff.

This instrument was *never recorded*. Upon this state of facts the plaintiff claims a lien, in the nature of an equitable mortgage.

The defendants, Caldwell, Hamilton, & Co., obtained a general judgment, in the district court of Douglas county, against the defendant Gise, October 29th, 1875, for \$2,142.40 and interest, and on the 3d day of November, 1875—twelve days before the plaintiff obtained its judgment—filed a transcript thereof in the clerk's office of Nuckolls county, where these lands are situated, and thereby the judgment became, it is claimed, a lien upon the property of the debtor in that county.

It appears that the consideration of the note upon which this judgment was obtained, was money loaned in July, 1873, to Gise, by the defendants. This judgment remains unpaid.

It is sought by the bill to postpone the lien of this judgment to the equitable lien claimed by plaintiff.

The bill alleges notice of this equity of plaintiff, on the part of Caldwell, Hamilton, & Co. The answer fully denies notice on the part of the defendants. The plaintiff failed to make any proof to support the allegations of the bill in that regard.

J. M. Woolworth, for the plaintiff.

G. W. Ambrose and *Clinton Briggs*, for Caldwell, Hamilton, & Co.

DILLON, *Circuit Judge*.—Counsel have largely argued this cause as if it involved the question whether the English doctrine of equitable mortgages, arising from the *mere* deposit of title deeds, prevails in the state of Nebraska. It may be admitted, for the purposes of this case, that the deposit of recorded title deeds, without more, will not create an equitable lien against the debtor, or a general judgment creditor of his, and yet the equity of the present cause is with the plaintiff.

The plaintiff corporation held coupons, convertible into lands, as a *specific* security for its debt. Without the debtor's consent,

First National Bank v. Caldwell.

it could have converted these coupons into lands, and taken the deed in its own name. Both the plaintiff and Gise, however, thought it advantageous to exercise the option of exchanging the coupons for lands. Gise made the selection of the lands, and the deed was taken in his name, *but not recorded*, and was delivered at once to the plaintiffs, and is now held by them in virtue of an agreement with Gise, made at the time, that the deed should be a substituted security in lieu of the coupons. Gise does not controvert the plaintiff's rights. The defendants, Caldwell, Hamilton, & Co., do not dispute the above facts, but contend that their rights, as a general judgment creditor of Gise, without levy or sale, are superior to the plaintiff's. There is no statute of Nebraska which, in terms, gives such effect to a general judgment lien, nor any decision of the supreme court of the state that a judgment lien overrides existing specific equities in lands, in favor of others. The plaintiff's rights, as the equitable mortgagee of the lands, or having an equitable lien upon them, are superior to the rights of a general judgment creditor, who has not become a purchaser under the judgment, in good faith, and without notice of the rights of the equitable mortgagee. (*Brown v. Pierce*, 7 Wall. 205, 217.)

DECREE FOR THE PLAINTIFF.

NOTE.—The question, in the foregoing cause, as to the respective rights of the equitable mortgagee and the judgment creditor, was very fully argued, and the following, on that point, is condensed from Mr. Woolworth's brief:

The rule in England is stated by Sir EDWARD SUGDEN, when Lord Chancellor of Ireland, in *Abbot v. Stratton*, 9 Sugden's Decisions, 3 Jones & LaTouche, 603, 614. He says: "Does such a mortgage take precedence, or not, of the subsequent judgments, however *bona fide* they may be, and supposing them to have been obtained for valuable consideration, and without notice of the equitable mortgage? I can only say that, ever since I have been in the profession, I have considered that a settled point; and down to the time a question was raised upon it, in *Whitworth v. Gangain*, reported in Craig & Phillips, 330, I never entertained a doubt upon the subject; and I have repeatedly acted in this court upon the rule that an agreement binding property for valuable consideration, though equitable only, will take precedence over a subsequent judg-

First National Bank v. Caldwell.

ment, whatever may be the consideration for it, and whether obtained in *invitum* or by confession. This is not denied to be so in the case of a purchase, and an equitable mortgage is, *pro tanto*, a purchase in the strict sense of the term. The agreement (for that is really the question) is, in this court, the mortgage—it is the pledge. The mere legal operation of the instrument goes for nothing; the agreement itself is, in the view of a court of equity, equivalent to the execution of a mortgage. It would be pedantry to go through the cases on this subject, after the full review of them in the case to which I have referred, when it was before Vice-Chancellor WIGRAM. I must, therefore, overrule the master's report, and declare that this is a valid, equitable mortgage, binding on the property as against subsequent judgment creditors."

The case referred to by the Lord Chancellor, in *Whitworth v. Gangan*, 3 Hare, 416, states not only the rule, but the reason of the rule, with that satisfactory fullness and precision for which Vice-Chancellor WIGRAM was very distinguished; and as in his judgment he considers all the arguments which might be in any way alleged, I shall set them out here:

"The more I consider the case, the more satisfied I feel that I stated the general principle correctly, in *Langton v. Horton*, when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, nothing more. He stands in the place of his debtor. He only takes the property of his debtor subject to every liability under which the debtor himself held it. First, take the case of an ordinary trust. It could not for a moment be contended that this court would not protect the interest of the *cestui que trust* against the judgment creditor of the trustee. The judgment of Lord COTTENHAM, in *Neulands v. Paynter*, is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. *Lodge v. Lyseley* is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment creditor of the vendor. Again, take the case of an equitable charge to pay debts, or legacies, or any other equitable interest, except that of an equitable mortgagee, and I apprehend the right of the equitable incumbrance to be preferred to the judgment creditor of the debtor in whom the legal estate in the property charged might be, will be, as indeed it properly was, admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of *Williams v. Craddock*, the counsel, as well as the court, were of the opinion that an interest by way of an equitable mortgage was entitled, in this court, to the same protection against judgments as other equitable claimants.

"In the argument of this case both parties referred to, and drew conclusions from, the proposition that, in a court of equity, a purchaser for value, who obtains a conveyance of the legal interest without notice of

First National Bank v. Caldwell.

an equity affecting the specific subject of his purchase, in equity as at law, has a better title to that subject than the mere equitable claimant. The proposition thus admitted, and necessarily admitted by both parties, is pregnant with consequences which go a great way towards deciding the question now before me. If the tenant by *elegit* is (as was argued) to be considered as a purchaser for value without notice under a conveyance, all trusts, and all equitable interests of every description, must be subject to the judgments against the trustee; for a purchaser for value, without notice from a fraudulent trustee, having got the legal estate, will unquestionably be preferred in equity to the *cestui que trust*; and it appears to me to be impossible, except by a merely arbitrary decision, to distinguish the case of an ordinary trust, or other equitable interest, from the present, in considering merely the effect of a judgment upon it, unless it can be shown that the interest of the equitable mortgagee is, for the present purpose, distinguishable from that of an ordinary *cestui que trust*. Again, it follows, conversely, that if the equitable interest of an ordinary *cestui que trust*, or any other equitable interest, is not subject to judgments against the trustee, though executed, then those judgments are not analogous to purchasers for value. In other words, the judgment creditor of a trustee is not a purchaser for value, in the contemplation of a court of equity. The proposition that a judgment creditor is a purchaser for value would prove too much for the defendants' purpose. It would affect all equitable interests alike.

"But it was said that the interest of an equitable mortgagee was distinguishable from that of an ordinary *cestui que trust*, and other equitable interests (charges, for example, to pay debts and legacies paramount to the title of the debtor), which it was admitted would be preferred in equity—that the interest of the equitable mortgagee was imperfect, that of the *cestui que trust* perfect. In what respect is the equitable mortgagee imperfect? As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgage, as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and in that respect, no doubt, it is imperfect. But that is an infirmity to which all equitable interests are subject; and if other equitable interests are to be protected against judgments obtained against the trustee or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which I think is not) in the one case than in the other.

"The most plausible way of stating the case in favor of the judgment creditor is by supposing his right to be founded in contract, and not the result of a proceeding in *invidum*; and this, no doubt, may be true of the case, when the judgment is voluntarily confessed; and I paid the

First National Bank v. Caldwell.

greatest attention to the arguments of counsel on that point. But, admitting that view to be correct, how does it alter the case? The question remains: what was the contract? It was a general contract for a judgment, and the fruits of a judgment; and the original question, therefore—what right does a judgment confer?—remains wholly untouched by the concession.

“If a party contracts specifically for a given property, pays the purchase money, and obtains the legal title, without notice up to the time of obtaining the conveyance, as well as of paying his money, that may give him a right to be preferred to an equitable claim which is prior in point of time. But there is no principle upon which a court of justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the debtor. If the trustee were to confess a judgment, am I to imply that it amounts to a specific contract to give the creditor an interest in that which belongs to the *cestui que trust*? That appears to me to be the true distinction. In one case a party contracts for a specific thing; in the other he merely takes a judgment; that gives him nothing more than a right to that which belongs to his debtor. The above propositions, which, separately taken, I believe to be unimpeachable, will be found to meet every argument that was addressed to me in support of the defendant's case independently of the late statutes. I am clear that the late statutes make no difference in the case. So far as the judgment creditor claims to be a mortgagee, in writing, under the statute, he is posterior, in point of time, to the plaintiffs. But it was said that the equity of the judgment creditor was equal to that of the equitable mortgagee, and that he has, by the force of the *elegit* executed, an estate at law in addition to his equitable interest, and therefore it is to be preferred. I need not, after what I have already said, proceed to expose the fallacy of this argument; it takes for granted the whole question in dispute. That the tenant, by *elegit*, has an estate in that which he may lawfully take (that which belongs to his debtor), I do not deny; but to say that, by force of the *elegit*, he acquires a rightful interest, in this court, in that which in equity does not belong to his debtor, is taking the whole matter in contest for granted; the whole question being what he may take.

“I can only repeat that it appears to me impossible, except on the most arbitrary distinction, to say that the interests of an equitable mortgagee are not to be protected, and yet that that protection is to be afforded to the interests of an ordinary *cestui que trust*, and other equitable interests. I do not go into the reasoning of the cases which have been cited; all of them, however, appear to me to support the view I have taken. If my judgment cannot be supported upon propositions which are indisputable in themselves, whether properly applicable to the case or not, no explanation I can give of the cases will at all strengthen the foundation of that judgment. I must hold that the

First National Bank v. Caldwell.

plaintiffs have a right to the payment of their debt out of the estate comprised in the deed."

This case was affirmed by Lord Chancellor COTTENHAM (1 Phillips, 728). In *Bowen v. The Earl of Oxford* (6 De Gex, M. and G.), it is held that the judgment creditors were not purchasers within the meaning of the statute (27 Elizabeth, c. 4), and the same rule has been held in many other English cases.

There are many American cases on this subject, but the supreme court of the United States has spoken decisively upon it in *Brown v. Pierce*, 7 Wall. 205. The court says, at page 217: "Express decision of this court is, that the lien of a judgment constitutes no property in the land; that it is merely a general lien securing a preference over subsequently acquired interests in the property; but the settled rule in chancery is that a general lien is controlled in such courts so as to protect the rights of those who were previously entitled to an equitable interest in the lands, or in the proceeds thereof. Specific liens stand upon a different footing, but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights. Correct statement of the rule is that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person," etc.

As to the deposit of title deeds as security for a debt, the English rule was first enunciated in *Russell v. Russell*, 1 Brown's Ch. 289, by Lord LOUGHBOROUGH. The other early English cases are *Plumb v. Hewitt*, 2 Anstruther, 438; *ex parte Corning*, 9 Vesey, 117; *ex parte Haigh*, 11 Ib. 403; *Norris v. Wilkinson*, 12 Ib. 196; *ex parte Mountford*, 14 Ib. 606; *ex parte Combe*, 17 Ib. 370. In *ex parte Hooper*, 1 Merivale, 9, Lord ELDON regretted the latitude to which it had extended to cover future advances in *ex parte Langston*, 17 Vesey, 230. Although from the first the judges animadverted upon the doctrine, it has been enforced in England. Some of the most recent cases in which the doctrine has been applied without observation on its propriety are *DeRochefort v. Dawes*, L. R. 12 Eq. 540; *Shaw v. Foster*, L. R. 5 H. L. 321. At page 340 Lord CAIRNS says: "It is a well established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to." (L. R. 7 H. L. 135.)

The same reluctance to admit the doctrine into the jurisprudence of this country was shown by the American courts, but it has received recognition by many of the judges who have dealt with it. In New York, in *Rockwell v. Habber*, 2 Sandf. Ch. 9; *Chase v. Peck*, 21 N. Y. 584;

 Thurston v. Union Pacific Railroad Company.

Jackson v. Dunlap, 1 John Ca. 114, Ch. J. Kent; *Jackson v. Parkhurst*, 4 Wend. 369; in South Carolina, in *Welch v. Usher*, 2 Hill's Ch. 166; in Georgia, in *Mounce v. Byers*, 16 Geo. 469; in New Jersey, in *Robinson v. Urquhart*, 1 Beasl. 523, and *Griffin v. Griffin*, 18 N. J. Eq. 104; in Wisconsin, in *Jarvis v. Dutcher*, 16 Wis. 327; in Maine, in *Hall v. McDuff*, 24 Me. 311; in California, in *Hill v. Eldred*, 49 Cal. 398; in Mississippi, in *Williams v. Stratton*, 10 Sm. & M. 418; in Rhode Island, in *Hackett v. Reynolds*, 4 R. I. 512; in the United States court for Wisconsin, in *Wright v. Shumway*, 1 Bissell, 23 (and see *Meador v. Everett*, 3 Dillon, 214), the doctrine has been applied. In Pennsylvania, in a series of cases, it has been denied. In Ohio it has been denied upon the peculiar terms of the recording act as construed by the courts (*Bloom v. Nagle*, 4 Ohio St. 45). In Kentucky it has been disapproved, but not rejected. Washburn, in his *Treatise on Real Property*, vol. 2 (4th ed.) 82, speaks as if in his view the doctrine had recently become established in this country. (*Ib.* p. 84, pl. 4.)

The following authorities were referred to by Mr. Ambrose and Mr. Briggs as to *deposit of title deeds*: Brown, *Stats. of Frauds*, 60; Story Eq. sec. 1020; Coote on *Mortg.* 222; 2 Wash. R. P. 85. As affected by the *recording acts* in Ireland: *Agra Bank v. Barry*, 9 English Rep. (H. of L.) 106; *Lee v. Clutton*, 3 Cent. Law Jour. 177, before Sir GEORGE JESSEL, master of the rolls.

 THURSTON v. UNION PACIFIC RAILROAD COMPANY.

Gamblers and monte-men, whose purpose in traveling upon a train is to ply their vocation, may be excluded.

(Before DUNDY, J.)

Expulsion of Gamblers from Railway Trains.

It was alleged, and not denied, that plaintiff had purchased from the road, for fifty cents, a ticket for crossing the river on the transfer train, and that when the train was about starting he attempted to board it, but was prevented. He also purchased, for ninety cents, from the company, a ticket good on another road, but was forcibly ejected from the train, and obliged to remain in Omaha several days before he could safely get away, for which he asked \$5,000 damages. The defendant admitted that

Thurston v. Union Pacific Railroad Company.

the necessary force (but no more) was used to prevent his entering the train. It was claimed that he had been for years a notorious gambler—a “monte-man,” so-called—and was then engaged in traveling on the defendant’s road for the purpose of plying that calling, and was about to enter the train for that purpose. This the plaintiff denied. The question was, whether the defendant has the right to exclude gamblers from its trains? Upon this point the charge of the court is given below.

John I. Redick, for the plaintiff.

Mr. Poppleton and *Mr. Wakely*, for the defendant.

DUNDY, J.—The railway company is bound, as a common carrier, when not over-crowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. The person must be upon lawful and legitimate business. Hence defendant is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the state laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled.

Whether the plaintiff was going upon the train for gambling purposes, or whether, from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury. If they find such to have been the case, they

In re Bull.

cannot give judgment for any more than the actual damage sustained.

After the ticket is purchased and paid for, the railroad company can only avoid compliance with its part of the contract by the existence of some legal cause or condition which will excuse it. The company should, in the first case, refuse to sell tickets to persons whom it desires and has the right to exclude from the cars, and should exclude them if they attempt to enter the car without tickets. If the ticket has been inadvertently sold to such person and the company desires to rescind the contract for transportation, it should tender the return of the money paid for the ticket. If it does not do this, plaintiff may, under any circumstances, recover the amount of his actual damage, viz.: what he paid for the ticket, and, perhaps, necessary expenses of his detention.

In this case the jury rendered a verdict for actual damages (\$1.74) and costs, the company not having tendered the money.

JUDGMENT ON VERDICT.

In re JESSE H. BULL and WILLIAM TURTLE. SAMUEL
McCLAY, Sheriff, respondent.

1. A person indicted in a state court for an act done in pursuance of a law of the United States, may be discharged from custody under such indictment, on a writ of *habeas corpus* issued by a federal court or judge, under section 753 of the Revised Statutes of the United States.
2. The relators were indicted in a state court for kidnapping, and were in custody under such indictment; they applied to a federal judge for a writ of *habeas corpus*, stating, in their petition for the writ, that they were indicted for acts done by them under sections 5278 and 5279 of the Revised Statutes of the United States, in executing a requisition for the surrender of the person alleged to have been kidnapped as a fugitive from justice; it appearing to the circuit court, on appeal, that this claim of the relators was not true: *Held*, that they were not entitled to be discharged, and the order of the district judge of the district, discharging the relators, was reversed.

In re Bull.

(Before DILLON, Circuit Judge.)

Habeas Corpus.—*Revised Statutes, Secs. 753, 5278, 5279, Construed.*—*Power of Federal Court to Release on Habeas Corpus Persons in Custody under State Authority.*

APPEAL IN *habeas corpus*. One John H. Blair was indicted in Chicago, in Cook county, Illinois, for perjury. The governor of Illinois issued his requisition, in due form, upon the governor of Nebraska, demanding the surrender and return of Blair to the state of Illinois. Mr. Bull, one of the relators, was appointed messenger, or agent, by the governor of Illinois, to receive and convey Blair to Cook county. The governor of Nebraska complied with the requisition, and caused the arrest of Blair in Lancaster county, Nebraska, and delivered him to Mr. Bull. Mr. Turtle, the other relator, was the assistant of Bull. Instead of taking Blair to Chicago by the nearest route, Bull and Turtle took him to St. Louis, and from thence one of them took him to New York, and thence to England, where he was arrested as soon as the ship on which he sailed had landed, and he was there confined in prison some months, until he was demanded by the government of the United States, and released by the government of Great Britain. This demand and release were upon the ground that Blair had been abducted from the United States. On Blair's return to this country he proceeded to Nebraska, and the criminal proceeding in Illinois has never been prosecuted.

After Blair's return, the grand jury of the state district court of Lancaster county, Nebraska, found an indictment against Bull and Turtle for kidnapping Blair, and forcibly and illegally taking him out of the state of Nebraska. They were arrested by the respondent, the sheriff of Lancaster county, upon a *capias* issued by the Lancaster district court upon this indictment, and were held in custody under that writ.

They, thereupon, presented their petition for a writ of *habeas corpus* to the Hon. E. S. DUNDY, the district judge of the United States for Nebraska, properly verified, setting forth, in substance, that they were restrained of their liberty and unlaw-

In re Bull.

fully imprisoned by Samuel McClay, sheriff of Lancaster county, the respondent; that they were *so restrained and imprisoned solely for acts lawfully done by them under and by virtue of the constitution and laws of the United States*; that the state of Nebraska was proceeding to try and seeking to convict and punish them for said acts in violation of the constitution of the United States, and the laws made in pursuance thereof; that the respondent claimed the right to hold the said relators by virtue of a *capias* issued by authority of law from the state district court of Lancaster county; that the *capias* was based upon an indictment found by the grand jury of said county, in May, 1876, against the relators, for kidnapping one John H. Blair, on or about the 6th day of November, 1875; that the laws of the United States specially and specifically authorized the relators to do the acts complained of, and for which they were indicted; that the said Blair had been indicted in Cook county, state of Illinois, for the crime of perjury there committed, and had fled to the state of Nebraska, when and where he was duly arrested as a fugitive from justice; that the governor of the state of Illinois issued his requisition in due form upon the governor of Nebraska, demanding the surrender and return of the said Blair to the state of Illinois; that Jesse H. Bull was duly appointed messenger to receive and convey to said state the said Blair; that the governor of the state of Nebraska duly honored the said requisition, and caused the arrest of said Blair, who was properly and lawfully delivered to the said messenger; that the said Turtle was present assisting said Bull, at his request; and that the several things here enumerated are the identical acts for which they were indicted, and are now held in custody.

The writ was issued, and the respondent made return to the writ and produced the relators, as he was commanded to do. The return to the writ shows clearly enough that the respondent then held the relators on a *capias* duly issued from the district court of Lancaster county, as stated in the petition. When the writ was returned, the relators filed a replication to the return, reiterating the substance of the petition. Counsel for the respective

In re Bull.

parties being present, the hearing was at once entered upon. Proceedings were had "in a summary way to determine the facts of the case, by hearing the testimony and arguments," for the purpose of disposing of the relators, "as law and justice require," as provided by section 761 of the Revised Statutes of the United States.

After hearing all the testimony, the district judge entered an order discharging the relators from the custody of the respondent. The facts of the case, the law pertaining to it, the positions taken by the respective counsel, and the conclusions of the district judge, were stated with great clearness in an opinion which accompanies the record on this appeal.

The district judge summed up his conclusions as follows:

"These views lead me to conclude—

"1. That Blair was properly indicted in Cook county, state of Illinois, for the crime of perjury.

"2. That the requisition and warrant issued by Governor Beveridge, of Illinois, under which Bull acted as messenger, were regular in form, and, therefore, valid and binding on all concerned.

"3. That the warrant issued by Governor Garber, of Nebraska, on which Blair was arrested and removed from this state, was regular on its face, and was a valid and lawful one.

"4. That all of these proceedings were had under and in pursuance of the constitution of the United States, and the act of congress passed in pursuance thereof, known as the 'extradition act.'

"5. That any effort or attempt on the part of the state authorities to hold or punish the relators for the removal of Blair under the requisition for extradition, is without authority and void.

"6. That the writ in this case was properly issued, and inquiry thereunder properly made, for the purpose of showing that the relators were held in custody for removing Blair from this state on the requisition of the governor of Illinois.

"It necessarily follows that the relators have not invoked in vain the aid of this 'high prerogative writ.' They must, there-

In re Bull.

fore, be discharged from the custody of the respondent, and it is so ordered."

The respondent, the sheriff, appealed to this court from the order discharging the relators from custody, and the cause was submitted on the pleadings, proofs, and exhibits.

Hunter & Sawyer, and *Brown, England, & Brown*, for the appellant.

Lamb, Billingsley, & Lamberson, and *R. E. Knight*, for the relators (appellees).

DILLON, *Circuit Judge*.—The writ of *habeas corpus* in this case was issued by the district judge for this district, under the authority conferred by that clause of section 753 of the Revised Statutes of the United States which relates to the case of a prisoner "in custody for an act done in pursuance of a law of the United States." The law of the United States here referred to is to be found in sections 5278 and 5279 of the Revised Statutes, providing for the demand and surrender of fugitives from justice. The relators claim that they have been indicted in the state court and arrested by its process for an act done by them in pursuance of the law of the United States relating to this subject, as incorporated in the two sections of the Revised Statutes above cited.

If the relators had been indicted and were in custody solely for acts done in pursuance of this statute, I agree with the learned district judge, in the elaborate and able opinion which he has filed in the case, that they could be properly discharged on *habeas corpus*. The cases referred to by him fully support his judgment on this point. (*United States, ex rel. Roberts, v. Jailor of Fayette County*, 2 Abb. U. S. Rep. 265; *ex parte Robinson*, 1 Bond, 39; *ex parte Jenkins*, 2 Wall. Jr. 521; *ex parte Jenkins*, *ib.* 539; *in re Neill*, 8 Blatchf. 156; *ex parte Joseph Smith*, 3 McLean, 121; *ex parte Bridges*, 2 Woods, 428; *United States v. Morris*, 2 Am. Law Reg. 348; *ex parte Robinson*, 6 McLean, 355.)

In re Bull.

If the identity of the act which forms the basis of the indictment with the act done *in pursuance* of the United States statute appeared on the face of the record, there seems to be no doubt as to the power of the federal court or judge, under the legislation of congress, to discharge the prisoner on *habeas corpus*. (*Ex parte Bridges*, 2 Woods, 438.) If this identity does not thus appear, the cases above cited establish a settled construction of the existing statute relating to the writ of *habeas corpus*, that this may be shown by proofs *aliunde*. Testimony on this subject was introduced before the district judge by the relators and by the respondent; and the same evidence is now before the circuit court. The district judge found, as a matter of fact, that all that was done by the relators *within the territorial limits of Nebraska*, was done by them under and *in pursuance* of the act of congress. In other words, he found as a fact that the purpose of the relators not to convey and deliver Blair to the proper authorities in Illinois, under the requisition, was formed *after* they had left the state of Nebraska, and not until they had reached the city of St. Louis. And thus finding, he held that their acts could not, by "relation," reach back to the time when they originally received Blair at Lincoln, in Lancaster county, Nebraska, so as to make them guilty of the *crime* of kidnapping within the last named county. I have read all the proofs in this case with attention and care; and while I admit that there is much conflicting testimony, I am constrained to differ with my learned brother as to what it ought to be taken (on such a hearing as this) as establishing, or as tending to establish, with such cogency as to make it proper to withdraw the case from the state tribunals by means of the writ of *habeas corpus*.

Upon the proofs before me, I am not satisfied that the relators kept within the scope of their duty under the requisition, or acted in pursuance of it. On the contrary, it seems to me that there is strong ground to maintain and believe that the procuring of the indictment against Blair in Chicago, the application for the requisition, and for the arrest of Blair, and the taking of him out of the state of Nebraska, and to England, were all part of a

In re Bull.

plan, formed beforehand, to effect this precise result, and that it was not the intention of the relators, at any time, to take their prisoner, under the requisition, to the state of Illinois to answer to the indictment. If so, it is clear that the relators could not justify their acts under sections 5278 and 5279 of the Revised Statutes, and they ought, in this event, to answer to the criminal justice of the state whose laws they have violated.

There is no provision of law for the removal of such a case as that of the indictment against the relators to a court of the United States for trial. Where it is clear that the imprisonment under the state authority is for an act done in pursuance of federal authority and warranted by it, it may be conceded that the federal judicial tribunals or judges may, on *habeas corpus*, discharge the prisoner from custody. But this should appear with reasonable certainty to justify a federal court or magistrate in withdrawing the case in this summary manner from the jurisdiction of the state court. If the latter court proceeds with it and denies the party any of the rights given or secured by the constitution, laws, or authority of the United States, he has a remedy by a writ of error in the supreme court of the United States. (Rev. Stats. sec. 709.)

An order will be entered in this court reversing and setting aside the order of the district judge discharging the relators from the custody of the respondent.

ORDERED ACCORDINGLY.

Wardell v. Union Pacific Railroad Company.

THOMAS WARDELL v. UNION PACIFIC RAILROAD
COMPANY *et al.*

1. A contract made on behalf of a corporation by the executive committee of the board of directors with a third person, in which the members of the executive committee have a secret interest, is fraudulent as against the corporation, and the corporation may repudiate it, although it may have been long acted upon and recognized by the officers of the corporation who made it.
2. Accordingly, a contract made by the Union Pacific Railroad Company with a person who afterwards organized with others and formed a corporation called the Wyoming Coal and Mining Company, by which the former company conveyed the right to prospect for coal upon its line to the latter for fifteen years, agreeing to purchase coal needed for its use for the said term, from the latter, at prices named in the contract, was set aside on the ground of fraud, the officers of the Union Pacific Railroad being shown to have been jointly interested with the other party to the contract.
3. After such a contract had been acted on for some years, the railroad company, on a change of management, having become the owner of nine-tenths of the stock of the coal company, forcibly took possession of the property of the latter company. On a bill filed by the owner of the one-tenth of the stock (he being the person with whom the fraudulent contract was made), the court decreed the contract to be fraudulent, and laid down the principles on which an accounting should be had between him and the railroad company.

(Before MILLER and DUNDY, JJ.)

*Fraudulent Contract made by Officers of a Corporation.—
Credit Mobilier.*

THIS case is submitted to the court for final decree, on the bill and amended bill, the answers, replication, and evidence.

The allegations of the plaintiff's bill, about which there is really no dispute, are that, on or about the 16th day of July, 1868, he and Cyrus O. Godfrey entered into a contract, in writing, with the Union Pacific Railroad Company, concerning the mining of coal in the lands of that company. This contract is made an exhibit of the bill, and reads as follows:

"This agreement, made this 16th day of July, in the year of our Lord one thousand eight hundred and sixty-eight, between

Wardell v. Union Pacific Railroad Company.

the Union Pacific Railway, by its officers, of the first part, and Cyrus O. Godfrey and Thomas Wardell, of the state of Missouri, or assigns, parties of the second part, witnesseth: That the said party of the first part agrees that the said parties of the second part may prospect, at their own expense, for coal on the whole line of the Union Pacific Railway, and its branches and extensions, and open and operate any mines discovered, at their own expense; that said railroad company agrees to purchase of said parties of the second part all clean, merchantable coal mined along its road, needed for engines, depots, shops, and other purposes of the company, and to pay for the same—the first two years at the rate of six dollars per ton, for the next three years at five dollars per ton, for the four years thereafter at four dollars per ton, and for the six years remaining at the rate of three dollars per ton—delivered upon the cars at the mines of the said parties of the second part, and which shall not be less than ten per cent added to the cost of the same to the said parties of the second part. This contract to be and remain in full force and effect for the full term of fifteen years from the date hereof. The said railroad company agrees to facilitate the operations of the said parties of the second part, in prospecting and otherwise, by means of such information as it may possess, and by furnishing free passes on its road to the agents of the parties of the second part, not exceeding six in number. Said railroad company further agrees to put in switches and the necessary side tracks, at such points as may be mutually agreed upon, for the accommodation of the business of the said parties of the second part; that the said parties of the second part agree to make all necessary exertions to increase the demand and consumption of coal by outside parties along the line of said railroad, and to open and operate mines at such points, where coal may be discovered, as may be desired by said railroad company, and to expend within the first five years from the date of this agreement, in the purchase and development of mines and mining lands, and in improvements for the opening, successful and economical working of the same, not less than twenty thousand dollars; also to fur-

Wardell v. Union Pacific Railroad Company.

nish for the use of said railroad company good, merchantable coal, and to pay all expenses for improvements for loading coal into cars. Any improvement desired by said railroad company, in regard to the coal to be used by it, shall be at the cost of said railroad company. In consideration of their exertions to increase the demand for coal, and the large sum to be expended in improvements, it is further agreed that the parties of the second part shall have the right to transport over said railroad and its branches, for the next fifteen years from the date of this agreement, coal for general consumption, at the same freight that will be charged to others; but the said parties of the second part shall be entitled, in consideration of services to be rendered as herein provided, to a drawback of twenty-five per cent on all sums charged for transportation of coal. The said railroad company agrees to furnish the parties of the second part such cars as they may require in the operation of their business, and to transport them as promptly as possible. This agreement to remain in force for fifteen years. The coal lands owned by said party of the first part are hereby leased for the full term of fifteen years to the said parties of the second part, or their assigns, for the purpose of working the same as may seem to them profitable; said parties of the second part to pay, for the first nine years, a royalty of twenty-five cents per ton for each ton of coal taken from their lands, excepting always coal taken from entries, air courses, or passage-ways, for which coal no royalty shall be paid; payments for the same being due and payable monthly. The royalty for the last six years of this lease shall be free, provided the price of coal to the railway is reduced to three dollars per ton. If three dollars and twenty-five cents or more per ton, then, in that case, the royalty shall be as during the first nine years.

"In witness whereof, we have hereunto set our hands and seals, this, the day and year first above mentioned.

(Signed.)

" OLIVER AMES,

" President of the Union Pacific Railroad Company.

" THOMAS WARDELL."

Wardell v. Union Pacific Railroad Company.

The bill then alleges that, a few months after this, Godfrey assigned to Wardell his interest in the contract, and, after that, divers persons, with himself, organized, under the laws of Nebraska, a corporation called the Wyoming Coal and Mining Company, to which corporation he assigned the coal contract.

Plaintiff alleges that, before this organization was effected, he had discovered and opened mines, and was in the profitable fulfillment of his part of contract by delivery of coal to the railroad company; and that, after the organization of this company and up to the 13th of March, 1874, he, as the superintendent, secretary, and general manager of the coal company, had successfully operated these mines, and had delivered all the coal needed by the railroad company, and that this latter company was at that date largely indebted to the former; that on that day the officers or agents of the railroad company, under a resolution of its board of directors, took forcible possession of the mines, books, papers, implements, tools, and personal property of the coal company, and have held and used them ever since; that the president and a majority, if not all, the directors and stockholders of the coal company, except himself, being also stockholders and directors in the railroad company, he can obtain no relief by any action of the coal company against the railroad company, and he prays the court for such relief.

There are many other allegations which are denied, and about which there is conflicting testimony—such as the extent and nature of plaintiff's interest in the original contract, and also in the coal company; but the making of the original contract, the assignment of Godfrey's interest in it, the subsequent formation of the coal company, the assignment of the contract to that company, and the taking possession of its effects by the railroad company, are established facts in the case.

The answer of the Union Pacific Railroad Company says that the aforementioned contract was a fraud upon that corporation; that it was made, on the part of the railroad company, by the executive committee of the board of directors, the whole or a majority of whom were, by agreement with Godfrey and War-

Wardell v. Union Pacific Railroad Company.

dell, to be jointly interested with them in the contract; that the terms of it were, for that reason, made so favorable to Godfrey and Wardell, and so unfavorable to the railroad company, as to enable the former to defraud the latter out of millions of dollars; that the organization of the Wyoming Coal and Mining Company was a device to enable the directors of the railroad company to participate in the profits, and had been agreed upon between themselves and Godfrey and Wardell, before the contract with them was executed. They, therefore, deny its validity, and its binding obligation on the company, whether in the hands of Wardell, or of the Wyoming Coal Company.

As regards the taking forcible possession of the property of the coal company, they say that the railroad company had, by the assignment of the other stockholders than Wardell, become the owner of nine-tenths of the stock of the coal company; that differences arising between the railroad company and Wardell, who, as superintendent of the coal company, had control of its affairs, and being wholly dependent for fuel to run their trains on the supply furnished by that company, and fearing a suspension by Wardell of that supply, they were compelled, in self-defence, to take control of the property, of which they were the owners in the proportion of nine to one.

They further allege that, after this, the railroad company and the coal company, by their several boards of directors, had a settlement of their transactions, by which the contract with Wardell and Godfrey was rescinded, and an indebtedness of the railroad company to the coal company of a million of dollars was agreed upon as a full settlement of all transactions between them; that both the coal company and the railroad company set apart and tendered to Wardell \$100,000 for his share in the coal company, under that settlement.

A general replication put all these allegations in issue.

J. M. Woolworth, for the complainant.

A. J. Poppleton and *E. Wakely*, for the defendant.

Wardell v. Union Pacific Railroad Company.

MILLER, *Circuit Justice*.—This cause has been submitted for final decree on the pleadings and proofs. We have been aided by a full oral argument, which has been reproduced in print.

1. The first and most important inquiry is, whether the charge of fraud upon the Union Pacific Railroad Company (the principal defendant) in the inception of the contract of the 16th of July, 1868, is sustained by the proof.

After the fullest examination of the testimony, and the maturest consideration of the very full printed arguments submitted to me during the summer vacation, I have reluctantly arrived at the clear conviction that it was a gross fraud upon that corporation and upon its shareholders, who were not interested in the contract.

The parties, on behalf of the railroad company, or rather the authority by which it was bound, was the executive committee of the board of directors of the company, and not the board itself. This committee was composed of a limited number of the directors, including the president. A majority of this committee, and those who are found to have been its controlling members, were interested in this contract when it was made. They were, therefore, making a contract on behalf of the railroad company, with themselves, in a matter in which their interest was wholly adverse to the company, and on their own side. Such a contract is void upon the clearest principles of public policy. The corporation is represented by an agent who controls both sides of the contract, and whose interest is in every way against his principal and in his own favor. All the selfishness of human nature is brought into play to secure terms most favorable to the party who acts for both parties, himself being one of them. While the glaring evil of this thing may be obscured by using the name of the corporation as one party, and that of individuals having no connection with the corporation as the other party, the danger that selfish greed will make with the agents of the corporation a contract of which they will reap the advantage and in which the corporation will suffer all the losses, is only increased

Wardell v. Union Pacific Railroad Company.

by the fact that the names of the parties really interested do not appear in the transaction.

The fraudulent character of this contract is not lessened by an inspection of its terms, or the evidence of its actual operation. It gave up the control of all the coal lands of the company for fifteen years. It bound them for that time to purchase all the fuel for a railroad of over a thousand miles from this company. It fixed the price to be paid at rates which, if the coal could be obtained at all in these lands, would amount to a fabulous profit. And it exacted no security from Godfrey and Wardell, who were men of limited means, for the performance of their contract to expend a considerable sum of money in seeking for and developing the coal mines.

We accordingly find that Mr. Wardell now claims, after a few years' operation under that contract, in which he has been repaid all his actual outlays with large profits, that the company organized under it was, when seized by the railroad company, possessed of property and rights of the value of two or two and a half millions of dollars. What was given for this? Nothing. It was made, if it existed at all, out of the property and the necessities of the railroad company, by means of the betrayal of its rights in that contract.

On the part of complainant, it is scarcely denied that the part taken by the executive committee and by Godfrey in this transaction was very reprehensible. But a vigorous effort is made to show that Wardell is innocent of anything wrong. The argument is that though Wardell was in the same building or suite of rooms occupied by the railroad company, or its executive committee, while the negotiations were going on which preceded the execution of the contract, he was kept in actual ignorance that any of the executive committee were to have an interest in it, until after it was signed. And Wardell testifies that he was kept in an outer chamber while Godfrey was taken into the sanctum where the chief priests of the fraud were consulted; and that he knew nothing of the interest which those men had or were to have in the contract until it was all over.

Wardell v. Union Pacific Railroad Company.

If this were true, it would be difficult to see how he can escape responsibility for their acts and the knowledge of his partner. If he chose to entrust that partner with negotiation of the contract, while he sat twirling his thumbs within ear-shot of what was going on, he must be bound by the result when he accepted and signed the agreement. To meet the force of this objection, it is urged in argument that the contract was made and completed on the 15th, and that nothing was said, even to Godfrey, of the interest of those members of the executive committee in it, until the 16th.

But for the zeal which the very able counsel for complainant has brought to the aid of this argument, I should feel inclined to give it but little consideration. In the first place, the contract bears date on this day—the 16th. It must, therefore, be *prima facie* held to have been made on that day. Next, while Mr. Wardell admits that on that day he did learn and consent to the arrangement by which all but one-tenth, or at most two-tenths, of the interest in that contract was to be divided among certain members of the executive committee, it is hard to perceive how the fact that he learned and consented to this on that day mitigated its flagitious character. And, lastly, it appears that neither Wardell nor Godfrey took possession of the written instrument, but that it was left, with their consent, in the hands of the clerk of the construction company, or *credit mobilier*, whose history has been so much ventilated since. Wardell stands alone in his version of this part of the transaction, and he is directly contradicted by Godfrey, who, when testifying, had no interest in the matter.

It is not necessary to refer to all the testimony on this subject. It leaves in my mind no doubt that both Wardell and Godfrey knew they were getting a more advantageous contract from the railroad company by reason of the interest which the officers of that company were to have in it, and that such was their purpose and expectation from the beginning.

An attempt is made to negative the fraudulent character of the contract by the testimony of the members of the executive

Wardell v. Union Pacific Railroad Company.

committee, to the effect that all they did was in the interest of the railroad company, and that they always intended to hold their interest in that contract in trust for the company. But I am satisfied that this is an afterthought, born of the odium of the *credit mobilier* explosion, and not at all established by the fact that after all had been discovered and difficulty with Wardell became imminent, they made a declaration of trust in favor of the company.

Nor do I see that the fact so much insisted on, if it were proved, that the Wyoming Coal Company scheme, or the scheme of any corporation by which the interests of the members of the executive committee in the contract might be realized and identified, was one conceived sometime after the contract was made, instead of before, is material. It is true that the answer avers that it was agreed on at the time the contract was made, and that this is not very clearly established. But whether that interest was to remain a secret trust in the contract in the hands of Godfrey and Wardell, or a recognized interest in a corporation founded on that contract, can make no difference in the fraud on which it was founded. It is the same contract, obtained by the same means, and controlled in its inception by the same parties, in the one case as in the other. Nor is there anything in the subsequent history of the transactions between the parties to remove the vice which attaches to that contract by reason of the fraud. The same men who made the contract on the part of the railroad company remained in its directory and had control of its affairs until about the time the rupture with Wardell took place. As soon as a new set of men, with Mr. Jay Gould at their head, obtained control of the corporation, they began to take measures to get rid of the contract. It is idle to say that the men by whose fraud the contract was executed, could, by their recognition of it afterwards, make it obligatory on the company, or estop it from setting up the fraud when it is made the foundation of a suit. It may be that the company cannot recover back money paid under that contract, but it seems very clear that it cannot be made to pay any more in compliance with its terms, by the action of a court of equity.

Wardell v. Union Pacific Railroad Company.

By what rule, then, shall we measure Mr. Wardell's rights? He has spent time and labor and money in discovering these mines, and in placing them in condition to be profitably worked. There has been accumulated in his hands, or in the hands of the Wyoming Coal Company, property of considerable value, which was taken possession of by the railroad company, and is still retained by it. Apart from the contract, and if it had never existed, he is entitled to a fair and reasonable compensation for his labor and time and skill. The fraud gives the railroad company no right to these without just compensation. This, however, cannot be measured by the profits of the mining as fixed by the prices of the contract, or the prices subsequently fixed between the two companies, for the mines were and are the mines of the railroad company, the coal was and is their coal, and the profits are their profits, except so far as Mr. Wardell's labor, skill, and any money actually advanced by him in the progress of the business, might authorize him to claim a share of those profits.

I am of opinion that, whatever moral excuse for the seizure of the property of the coal company by the railroad company may be found in the existing circumstances, the act was unwarranted in law. Nor do I think that Wardell can be bound by a settlement made by the directors of the two companies, for the same reason that his contract is not valid, namely, that both interests were practically represented by the same parties, and both were hostile to him. But, while there is here no defence of the company against Wardell, the extent of his remedy remains to be considered. The contract cannot be restored, for it never had a valid existence. The mines must remain under the control of the railroad company, for the possession of Wardell and the coal company was a fraudulent one. The transactions of the past cannot be measured by the prices of that contract, for the same reason. The two companies have made a nominal or formal settlement of this question, which binds them, and they offered Mr. Wardell his share—all that, I think, as a member of the coal company, he is entitled to.

I have grave doubts, with the views which I entertain as to the

Miller v. Sullivan.

principles on which an accounting should be had, whether he can get any more. I am inclined to give him a decree for the one hundred thousand dollars which has thus been offered to him, without interest to the date of the decree, each party to pay his own costs. But if he insists upon a reference to a master for an accounting, he can have such an order, the account to be taken on the basis of a fair compensation for his time, skill, and services while engaged in the business, with a return of his money actually invested, and compensation for its use—the sum thus ascertained to be credited with what he has actually received, during the time, out of the business. If plaintiff accepts the former alternative, let a decree be entered accordingly. If he claims the latter, and it becomes necessary, I will consider a written or printed argument as to the basis of the reference.

DUNDY, J.—I concur in the foregoing opinion.

DECREE ACCORDINGLY.

MARY F. MILLER v. JULIA SULLIVAN.

1. The legislation of the state of Nebraska, as respects sales of real estate by guardians, considered, and the principles of *Grignon's Lessee v. Astor*, 2 How. 319, adopted and applied.
2. The special five years statute of limitations for the protection of the rights of a purchaser of land at a guardian's sale, is available to the holder of the title thus acquired, even though the sale by the guardian might not be good if it had been attacked within the five years.

(Before DILLON and DUNDY, JJ.)

Guardian's Sale.—Construction of Nebraska Statute.—Special Statute of Limitations in Respect of Guardian's Sales, Construed and Applied.

THERE is no controversy over the chain of title of the plaintiff, it being from the United States to Touissant Kensellur—a half-breed Indian—from him to William Miller, and from Mil-

Miller v. Sullivan.

ler to the plaintiff. The title of the defendant is one acquired by virtue of proceedings had in the probate court of Richardson county, Nebraska, upon application of the guardian of the patentee, who was a minor.

The material questions in the case relate to the validity of the guardian's sale of the land, and the effect of the five years statute of limitations in respect of such sales.

The records of the probate court, at and before the time when the sale was made by the guardian, were loosely and imperfectly kept. The then probate judge testifies that the county furnished him no record books, and he kept the appointments, orders, and proceedings in his court on sheets, put away in envelopes. The original appointment of the guardian, and that he took the oath required by law, appear on the files of the probate court, and by recitals in the license of February 10th, 1862. The bond required of a guardian on his appointment, was given and approved, and is still extant, and is substantially in the form required by law. The petition of the guardian, in 1864, to sell the land now in controversy, duly sworn to, and containing all the essential requirements of the statute, is still on the files of the probate court. A bond of the guardian, not dated, and not appearing to be approved, reciting the license to sell, is also on the files of that court.

No report of sale, under the petition and license of 1864, is on file in the probate court. The then probate judge testified that the bond was approved; that the sale by the guardian was reported to and approved by him, and that the land sold for its full value.

The guardian's deed, dated January 10th, 1865, recites a sale of the land in controversy, September 5th, 1864, after notice in a public newspaper. The guardian was the father of the ward. No notice of the application of the guardian for license to sell was served upon the father, he being the guardian and next of kin, or on the minor, nor upon any other person; but the aunts of the minor, who seem to have been supposed to be his next of kin, or part of his next of kin, were of age, and authorized an attor-

Miller v. Sullivan.

ney to appear for them, and he did so appear in the probate court, and "waived notice to bring in the next of kin."

The statute then in force on the subject of guardian sales, section 7, required "that, upon the presentation of this petition (to sell), the court shall thereupon make an order, directing the next of kin of the ward, and all persons interested in the estate, to appear," etc. Section 8 provided: "A copy of such order *shall be personally* served on the next of kin of such ward, and all persons interested in the estate." * * * In section 42 of the succeeding chapter, the legislature uses this language: "All those who are next of kin, and heirs, apparent or presumptive, of the ward, shall be considered as interested in the estate."

When personal notice of the time and place is required to be given, they (the next of kin and heirs apparent) shall be notified as persons interested, according to the provisions respecting similar sales by executors and administrators, which provisions are that it must be personally, by publication, or assented to in writing, by "all persons interested in the estate."

Section 23 of the guardian's act under consideration, provides that the sale shall not be avoided on account of irregularity in the proceedings: *Provided*, it shall appear (1) that a guardian was licensed to make the sale by a probate judge of competent jurisdiction; (2) that he gave bond; (3) that he took the oath; (4) that he gave notice of the time and place of sale, as prescribed by law; (5) that the premises were sold, accordingly, at public auction, and are held by one who purchased in good faith.

The statute of Nebraska also provides: "No action for the recovery of any real estate sold by a guardian * * * shall be maintained by the ward, or by any person claiming under him, unless it be commenced within five years after the termination of the guardianship, excepting," etc. (Territorial Laws Neb. 1861, p. 68, sec. 22; Gen. Stats. Neb. p. 287, sec. 63.)

The land in question was purchased at the guardian's sale in good faith, and the defendant and those under whom he claims have been in actual possession of it ever since. It was unimproved when sold by the guardian, and has been improved by

Miller v. Sullivan.

the purchaser from the guardian. This suit was not brought within five years after the minor attained his majority, which, of course, terminated his guardianship.

A jury was waived, and the cause was submitted to the court upon evidence which showed the foregoing facts.

Mr. Ambrose, for the plaintiff.

Mr. Manderson and *Mr. Martin*, for the defendant.

DILLON, *Circuit Judge*.—This case presents questions of great importance. I have considered them deliberately, but shall dispose of them briefly.

The statute of Nebraska did not require notice of the application of the guardian for license to sell to be served upon the minor or ward, but only "on the next of kin, and all persons interested in the estate."

If we consider as proved the facts testified to by the probate judge in connection with what is shown by the records of the probate court, the most serious defect alleged to exist in the sale arises out of the want of service of notice upon the next of kin and others interested in the estate. The guardian was duly appointed, took the required oath, gave bond, filed a petition to sell; the aunts of the minor authorized an attorney to appear for them and waive notice, which he did; a license to sell was granted, a bond was given and approved, and a sale was made in good faith and confirmed, and a guardian's deed executed and possession taken under the sale, and maintained ever since.

Guided by the views of the supreme court of the United States, I doubt very much whether, under the Nebraska statute, the application of a guardian for a license to sell should be regarded as an adversary proceeding as against the "next of kin and all persons interested in the estate" of the ward. (*Grignon's Lessee v. Astor*, 2 How. 319; *Thompson v. Tolmie*, 2 Pet. 157; *Cooper v. Reynolds*, 10 Wall. 303; *Good v. Norley*, 28 Iowa, 188, and cases cited on page 208.) The supreme court of Nebraska has never held otherwise upon this statute. But whatever may be the true view on this point, I am of the opinion that the five

Miller v. Sullivan.

years limitation provided by the statute of Nebraska, in respect of sales by guardians, will protect the sale in question. The sale was made by a guardian duly appointed, and who duly qualified; a petition for a sale was presented and granted; a bond was given; the sale was made at public auction after the prescribed notice had been published. If the father was the next of kin, he of course had notice, being the guardian, and the aunts of the minor authorized an attorney to appear for them, and he did so appear and waive notice. Possession was taken under the sale, and more than five years elapsed after the minor attained his majority before this suit was brought. I am of opinion that the five years limitation statute applies to such a sale and protects the purchaser.

Such a purchaser can avail himself of the bar afforded by the statute, without showing a sale which would have been valid if it had been attacked within the five years. (*Holmes v. Beal*, 9 Cush. 223; *Norton v. Norton*, 5 Cush. 524; *Arnold v. Sabin*, 1 Cush. 525; *Wilkinson v. Leland*, 2 Pet. 627; *Howard v. Moore*, 2 Mich. 226; *Coon v. Fry*, 6 Mich. 506; *Pursley v. Hays*, 22 Iowa, 35; *Good v. Norley*, 28 Iowa, 188; *Boyles v. Boyles*, 37 Iowa, 592; *Dalton v. Nelson*, 3 Dillon, 469.)

I stand by my opinion in *Good v. Norley*, 28 Iowa, 188, 206.

The case might be different—I do not say it would be—if no possession had been taken and maintained under the purchase for more than five years after the termination of the guardianship. It might be different if one had assumed to make a sale as guardian, who had never been appointed guardian or licensed to make the sale. But we need not consider such supposed cases.

Upon the actual case before us, we think the statutory bar is effectual, and that the defendant is entitled to judgment. This is a wise statute, doubly wise in a new country, for reasons which fully appear in this case. It would be robbed of its virtue if it was confined to cases where the sale was valid, for such sales do not need the protection of such a statute. "They that are whole need no physician."

DUNDY, J., concurs.

JUDGMENT FOR THE DEFENDANT.

In re Brewer & Bemis Brewing Company.

In re BREWER & BEMIS BREWING COMPANY.

A petition for adjudication in bankruptcy cannot be sustained in which the only act of bankruptcy alleged is the failure to pay a specified piece of commercial paper, where the original default in payment occurred and had continued more than six months and forty days before the proceedings in bankruptcy were commenced.

(Before DILLON, Circuit Judge.)

Bankrupt Act.—Act of Bankruptcy.—Suspension of Payment of Commercial Paper.—Six Months Limitation Construed.

On the 8th day of March, 1876, the petition in bankruptcy, on which the adjudication is sought, was filed by the Omaha National Bank against the Brewer & Bemis Brewing Company. It alleged as an act of bankruptcy the stoppage, or suspension, and non-resumption of payment, for a period of forty days, of a note for \$10,000 given to the Omaha National Bank, dated October 7th, 1873, at ninety days, interest at twelve per cent per annum after maturity, signed "Brewer & Bemis Brewing Company," and by others. The amended petition was dismissed by the district court, on the ground that the alleged act of bankruptcy was barred by the six months limitation in the bankrupt act (sec. 39).

The following facts appear in the record: The \$10,000 note was for ninety days and dated October 7th, 1873. It matured January 8th, 1874. Forty days after maturity would be February 17th, 1874. Six months after the forty days would be August 17th, 1874. The petition in bankruptcy was filed on March 8th, 1876, that date being two years and two months after the maturity of the paper, two years and twenty days after the period of forty days of non-resumption of payment, and over one year and six months after the expiration of the six months limitation. It is also shown by the record that all other commercial paper of the Brewer & Bemis Brewing Company is paid. The \$10,000 note, now nearly four years overdue, is the only one outstanding.

In re Brewer & Bemis Brewing Company.

The provision of the bankrupt act, as amended (sec. 39), is that "a bank, banker, broker, merchant, trader, manufacturer, or miner who has stopped or suspended and not resumed payment, within a period of forty days, of his commercial paper (made or passed in the course of his business as such), * * * shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt upon a petition of one or more of his creditors," etc.; "provided that such petition is brought within six months after such act of bankruptcy shall have been committed."

The petitioning creditors seek in this proceeding in the circuit court to reverse the order of the district court dismissing their amended petition.

E. Wakeley and W. O. Bartholomew, for the petitioning creditors.

George W. Doane and Charles F. Manderson, for the Brewer & Bemis Brewing Company.

DILLON, *Circuit Judge*.—The only question that need be considered is whether a petition for adjudication in bankruptcy can be sustained, in which the only act of bankruptcy alleged is the failure to pay a specified piece of commercial paper, where the original default in payment occurred and had continued more than six months and forty days before the proceedings in bankruptcy were commenced. The decisions on this point are conflicting. The ruling of the district court in this case is in conflict with the opinion of two very able and learned circuit judges. (*Baldwin v. Wilder*, 6 Bankr. Reg. 85, EMMONS, J.; *in re Raynor*, 7 *Ib.* 527, WOODRUFF, J.) It is sustained by the decision in *Mendenhall v. Carter*, 7 *Ib.* 320. I have considered the reasoning of the judges in these cases, and the arguments of the counsel in the present case, and am of opinion that the judgment of the district court, on the point here involved, is correct.

Assuming that an act of bankruptcy can be predicated of the failure to pay one piece of commercial paper, without valid

In re Brewer & Bemis Brewing Company.

and sufficient reasons for such failure, I think the "stopping," under the facts of this case, was an act which ripened into a definite and complete act of bankruptcy after the lapse of forty days from the day of the original default, and that creditors are barred from making that act the sole basis of an adjudication in bankruptcy unless the petition therefor "is brought within six months after such act of bankruptcy shall have been committed," that is, within six months after the act of bankruptcy became consummate, which was at the end of six months and forty days from the day of the original default. I concur in the main with the reasoning of DICK, J., in the case last cited, and refer to his opinion as a clear, and, to my mind, very satisfactory, exposition of the subject. After the lapse of the period above named, it accords with the obvious purpose of the short six months limitation in section 39, and with the analogies furnished by the other specified acts of bankruptcy, to hold that the petitioning creditors, under the facts appearing in the record, are precluded from making this default the ground of an adjudication, and are confined to their ordinary remedies. The order of the district court is affirmed.

AFFIRMED.

REPORTS OF CASES DETERMINED
IN THE
Circuit Court of the United States,
FOR THE
DISTRICT OF KANSAS.

SAMUEL F. CRAIG v. SMITH & HALE.

The drive well-tube patent issued June 11th, 1867, to the plaintiff, is for a *combination*, of which the air chamber is part; and the enlarged *drill-head*, and the application of the wire screen on the *outside* of the tube, held not to be novel; and as the tubes made by the defendant do not contain the air chamber (an essential part of the plaintiff's patented combination), there is no infringement of the plaintiff's patent.

(Before DILLON and FOSTER, JJ.)

Patent Drive Well.—Combination.—Infringement.

A DECREE was entered in this suit at the June term, 1873, sustaining the plaintiff's patent (2 Dillon, 375). A bill of review was filed, and issue taken thereon, and a large amount of additional evidence was produced. In this shape the cause now came before the court.

Alfred Ennis, for the plaintiff.

Guthrie & Brown, for the defendants.

FOSTER, J.—The patent of the plaintiff is for “combination and arrangement of the perforated end of the well tube around

Craig v. Smith.

which the wire screen or gauze is placed; the point secured to the end of the tube forming the chamber and air passage."

The patent is evidently for a combination of devices, not new in themselves (except, perhaps, the chamber and air passage). The plaintiff claims the wire screen on the outside of the perforated tube as new, but the several applications for patents made before plaintiff claims his discovery, show that that device is not new. The claim of Charles Batchelor, filed November 8, 1865, in the patent office, and rejected, embodied this principle of the wire screen, with an enlarged drill-head to protect the screen. The patent of Batchelor, Park, & Sherman, of December 12, 1865, had an outside strainer, protected by an outside casing. The patent of J. C. & M. V. Campbell, January 8, 1866, has the strainer or conical plug or point, and the patentees say they do not claim the plug as new, it having been described in the patent to James Suggett, March 29, 1864. The application of George Mallory, July 10, 1865, presented a claim for the wire screen on the outside or inside; the application was rejected. The application of Arthur T. Wilder, August 20, 1866, for outside screen or gauze, was rejected, being anticipated by Batchelor's patent of December 12, 1865. The application of Augustus Harrington, June 29, 1866, among other things, presents the screen and enlarged drill-head. The applications of Dodge, and also Knapp & Pease, present claims for similar screens.

These cases abundantly show that the plaintiff's claim of novelty for the screen is not sustained. The defendants are making a similar device to plaintiff's patent, except the chamber and air passage in the drill-head.

The plaintiff's patent being for a combination, two questions arise in the case:

1st. If the plaintiff claims for the wire screen and enlarged drill-head, with the air chamber, is his invention new?

2d. Do the defendants infringe that patent unless they use the whole combination, including the air chamber and passage?

The first question we are compelled to answer in the negative. The rejected application of Batchelor, November 8, 1865, pre-

Craig v. Smith.

sented substantially the same combination. The applicant says: "The enlargement or shoe B, protecting the strainers from being injured on the descent of the tube." The application of Harrington, June 29, 1866, also included these devices. In the application of Wilder, August 20, 1866, the screen was extended on the outside of the tube from shoulder to shoulder, the lower shoulder being the enlarged drill-head, thus combining the screen and enlarged drill-head. The application of George Dodge, March 13, 1866, presents the screen and enlarged drill-head. From these several cases, to say nothing of the affidavits presented on the application for rehearing, we are led to conclude that the combination of these two principles is not new.

On the second point: The plaintiff's claim, as amended on the suggestion of the commissioners of patents, is for the combination and arrangement of the several parts of his device. Those several parts are three in number, to-wit: The wire screen, the enlarged drill-head, and the air passage. The first two devices being old in severalty and in combination, can the defendants be charged with infringing plaintiff's patent by making use of these without the air passage?

Curtis on Patents, section 111, says: "The combination must be new itself, and must produce a new and useful result, not due to the separate action of any one of the devices used in combination nor attained thereby, but due to the co-operation or reciprocal action of the combined devices. And in such a case any one may lawfully use any one of the old devices separately or in new combinations, or may use some of them in combination and omit others."

In the case of *Hill v. Thompson* (Webster's Patent Cases, 243), the court, on the subject of combinations, says: "Neither can it be justly said that the use of the separate ingredients, or some of them practically combined, is a use made of the invention in part. * * * Each of the ingredients had before been separately used, and had been used more or less in partial combination."

Again, in *Barnett v. Hall*, 1 Mas. 447 (Curtis, sec. 332), it was

Craig v. Smith.

held: "When the patent is for the combination alone, it is no infringement to use any of the parts or things which go to make up the combination, provided the combination itself is not used."

In *Prouty v. Ruggles*, 16 Peters, 336, the court holds: "The use of any two parts only, or of two combined with a third, which is substantially different in form, or in the manner of its arrangements and connection with the others, is therefore not the thing patented. It is not the same combination if it substantially differs from it in any of its parts." (Curtis, 332.) In a late case, *Garrett v. Sibert*, the United States supreme court, at its October term, 1873, held the same doctrine.

The combination of the outside screen and the enlarged drill-head not being new or patentable, if the combination of the plaintiff were patentable at all, it must have been so by reason of the combination of the air passage with the other devices, or a combination of the whole, as set forth in the specifications. If the plaintiff could or should abandon the claim for the chamber and air passage, he has no patentable combination left. The plaintiff claims that the defendants have made use of an equivalent for his air chamber and passage, that the enlarged drill-head is of itself an equivalent, as by making a hole larger than the tube, it facilitates the drawing up of the same, which was the real purpose of the air passage.

If this be true, it would merely prove that the air passage was no improvement on the old drill-head, instead of proving that the old drill-head was an equivalent for the air passage. On the second question, therefore, we are compelled to hold the negative, and that there is no infringement of plaintiff's patent by the defendants in this cause.

DILLON, Circuit Judge.—On this bill of review a large amount of additional evidence has been produced, and I am of opinion that the plaintiff's patent is for a *combination*, and that the *air chamber* was designed to be part of the combination for which the patent issued. The enlarged drill-head is not new; and the evidence, on the hearing, shows, though it did not on the first

Smith v. Life Insurance Company.

hearing, that the application of the gauze or screen to the *outside* of the perforated tube is not original with the plaintiff. It is admitted that the defendants' tubes do not contain the air chamber, an essential part of the plaintiff's combination, and hence there is no infringement. Judge FOSTER, upon an independent examination of the cause, and of the printed arguments, made at my instance, has reached the same result, and in the conclusions stated by him I concur. The former decree must be reversed, and a decree entered dismissing the bill.

DECREE ACCORDINGLY.

SMITH v. MISSOURI VALLEY LIFE INSURANCE COMPANY.

1. The plaintiff, a married woman, domiciled in Missouri, through her husband, applied for and received from a Kansas life insurance company, doing business in Missouri, a policy of insurance on the life of her husband, of which the annual premium exceeded \$300; the policy, by its terms, was payable, on the death of her husband, *to the plaintiff*: *Held*, that, under the Missouri statute (2 Wag. Stats. p. 936, sec. 15), the policy was not void because the annual premium exceeded \$300.
2. The right of action was in the plaintiff, and not in the administrator of the husband.
3. The company cannot set up, to defeat the right of action in the plaintiff, that all or some part of the recovery money, under the statute of Missouri, would be held in trust for the estate or creditors of her husband.

(Before DILLON, Circuit Judge.)

Life Insurance.—Parties.—Policy to Married Woman on Life of Husband.—Missouri Legislation Construed.

THE court finds, from the evidence, the facts to be as follows:

1. That the defendant is a corporation existing under the laws of the state of Kansas; that on June 30th, 1861, the plaintiff made an application at St. Louis, in the state of Missouri, to the

Smith v. Life Insurance Company.

defendant, for a policy of insurance on the life of her husband, Henry Smith, for the benefit of herself; such application, signed Augusta S. Smith, by Henry Smith, was soon after delivered to the defendant, and on July 3d, 1861, accepted by it, and the policy of insurance in suit was written, and signed by the president and secretary of the defendant, and the corporate seal affixed, at its home office, in Leavenworth, state of Kansas, and was afterwards countersigned and delivered by the defendant's agent in St. Louis, state of Missouri. All premiums paid were paid in St. Louis, and all premium receipts were there countersigned and delivered. The policy, by its terms, is payable, on the death of the husband, "to Augusta S. Smith" (the plaintiff).

2. At the time of making such application, and delivery of such policy, the plaintiff and said Henry Smith were residents of St. Louis, in the state of Missouri, and citizens thereof, and the plaintiff has ever since continued to be such resident, and said Henry Smith continued to be such resident and citizen until his decease, in 1874.

3. That the insured, Henry Smith, died in St. Louis on the 6th day of October, 1874, and the plaintiff soon after gave notice of death, and served the proofs of the loss required by the said policy.

4. That said Henry Smith left a last will and testament, appointing the plaintiff executrix thereof, which will and testament was, on the 24th day of October, 1874, proved and admitted to probate by the probate court of St. Louis county, and state of Missouri, in which county St. Louis is situate.

That the plaintiff, after citation by such probate court, refused to take letters testamentary or administer said will, and thereupon, and on the 18th day of November, 1874, said probate court granted letters of administration, with the will of Henry Smith, deceased, to George E. Leighton and Lewis B. Parsons, then and still residents of the city of St. Louis, and citizens of Missouri, and said Leighton and Parsons qualified as such administrators on the 18th day of November, 1874, and have ever since been such administrators, and now claim, but not as parties

Smith v. Life Insurance Company.

to this suit, to be the owners of the policy of insurance sued on, and as such administrators to be entitled to recover the money due under the said policy of insurance.

5. That said Henry Smith was insolvent at the time of his death, and his estate is insolvent, but was not insolvent when the policy was issued, and for a long time afterwards. It does not appear whether the premiums were paid out of the husband's or the wife's estate.

6. That, at the time the policy sued on was issued, the life of said Henry Smith was insured in the sum of \$21,000 in other insurance companies, in which the plaintiff was the beneficiary, which policies were in force at the time of his decease, and the plaintiff has commenced suits in New Jersey and Connecticut for the recovery of the amount of each of them, which suits are now pending, and are contested by the companies.

7. That the annual premium paid on the policy in suit exceeds the sum of three hundred dollars.

8. That chapter 115 of the statutes of the state of Missouri (being chapter 94 of Wag. Stats.), entitled "Married Women," section 15 of which is in the words following: "SEC. 15. It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her, and for her use, free from the claims of her husband, or any of his creditors; but such exemption shall not apply when the amount of premium annually paid shall exceed the sum of three hundred dollars," was, at the time of making such application and delivery of such policy of insurance sued on, and still is, in full force and effect. And that section 18 of the same chapter, in the words following: "SEC. 18. Any policy of insurance, heretofore or hereafter made by any insurance company upon the life of any person, expressed to be for the benefit of any married woman, whether

Smith v. Life Insurance Company.

the same be effected by herself or by her husband, or by any third person in her behalf, shall enure to her separate use and benefit, and that of her children, if any, independently of her husband and of his creditors and representatives, and also independently of such third person effecting the same in her behalf, his creditors and representatives; and a trustee may be appointed by the circuit court for the county in which such married woman resides, to hold and manage the interest of any married woman in any such policy, or the proceeds thereof," was, at the time of making such application for insurance and issue and delivery of such policy, and still is, in force.

9. It is admitted that, if the laws of Kansas apply to and govern the case, the plaintiff is entitled to recover.

J. C. Douglas, for the plaintiff.

Mr. Hurd and *Mr. Monroe*, for the defendant.

DILLON, *Circuit Judge*.—The defence is, that this is a Missouri transaction; that, under the statute of that state (2 Wag. Stats. 936, sec. 15), the policy is void *in toto*, as the annual premium exceeded \$300; or if this be not so, the right of action is in the administrators of the husband, and not in the plaintiff; and that the plaintiff is neither the legal owner of the right of action, nor "the real party in interest," and hence cannot maintain this suit.

I concede without inquiry, for the purposes of this case, that the Missouri statute applies, and will govern in determining the validity and effect of the contract. The entire chapter in which this provision occurs is one expressly designed to enlarge the rights of married women, and should be construed to carry out its purpose. A married woman always had an insurable interest in the life of her husband, and if she paid the premiums for the risk out of her own estate, she could insure his life for any sum upon which she and the insurer might agree. And a husband who is free from debt may insure his own life for his wife's benefit for any sum he may choose. It is a mode, and a favorite

Smith v. Life Insurance Company.

mode, for making provision for wife and children. The statute of Missouri (sec. 15, *supra*, *et seq.*) is not entirely free from obscurity, but the construction placed upon it by Judge TREAT, of the United States district court, seems reasonable, viz.: that under its provisions an insolvent husband may withdraw from his estate for this purpose not exceeding \$300 annually, where the beneficial interest in the policy is in the wife. If the insolvent husband pays more, the policy is not void, but the wife, if she recover, might hold in part in trust for the creditors as represented by the husband's administrator, or assignee in bankruptcy. (*In re Yeager*, 8 West. Ins. Review, 378; *Charter Oak Co. v. Brant*, 47 Mo. 419; *McComas v. Covenant, etc. Ins. Co.* 56 Mo. 573.)

The case before the court, in any view of the Missouri statute as to the respective rights of the plaintiff and the creditors of the husband, is easy of solution. The agreement of the defendant in the policy is, "to pay the amount assured to Augusta S. Smith." This gives her the right to sue upon the policy in her own name. If she recovers, it is a different question whether she may not hold the proceeds of the recovery, or some part thereof, for the benefit of the estate of her husband, if necessary to pay debts. The company cannot set up such supposed rights in others, to defeat an action on the policy. The plaintiff, having the legal title, may maintain the action, and this will protect the company from another suit, and in the event of a recovery by her, the equities of others, if any exist, which I do not decide, can be adjusted in an action between them and the plaintiff. The administrators of the husband are not here insisting upon their rights, if they have any, and the company cannot set up rights for them, and, on its motion, introduce into this suit matters with which it has no concern. I am of opinion the plaintiff is entitled to recover.

JUDGMENT FOR PLAINTIFF.

Crocker v. National Bank of Chetopa.

CROCKER, Assignee, v. FIRST NATIONAL BANK OF CHETOPA.

1. A national bank located in Kansas charged and received interest at the rate of eighteen per cent per annum: *Held*, that it was liable, under the national banking act (Rev. Stats. secs. 5197, 5198), to pay back twice the amount of interest thus received.
2. If the person who paid such illegal interest is adjudged a bankrupt, the right of action passes to his assignee in bankruptcy, such assignee being his "legal representative" within the meaning of section 5198 of the Revised Statutes.
3. The amount of the recovery is twice the full amount of interest paid, and is not limited to twice the *excess* of interest paid over the legal rate.

(Before DILLON, Circuit Judge.)

National Banks.— Revised Statutes, Sections 5197, 5198, Construed.— Rate of Interest.— Right of Action to Recover Back Illegal Interest Passes to Assignee in Bankruptcy.— Extent of Recovery.

THIS is an action by an assignee in bankruptcy, brought in 1875, to recover from the defendant, a bank organized under the act of congress commonly known as the national banking act, double the amount of interest which he charges was taken from the bankrupts by the defendants upon numerous transactions after 1872 and prior to the bankruptcy. The petition states in each count that the interest charged was "a greater rate of interest than was allowed by the laws of the state of Kansas."

It is material to inquire what was the law of the state of Kansas in regard to interest, during the period covered by the counts not barred by the statute. To properly understand the Kansas interest law, it is necessary to begin with the general statutes, 1868, chapter 51, page 525, which contain the following:

"SEC. 2. The parties to any bond, bill, promissory note, or other instrument of writing, for the payment or forbearance of money, *may stipulate therein for* interest receivable upon the amount of such bond, bill, note, or other instrument, at any rate not exceeding *twelve per cent* per annum.

Crockèr v. National Bank of Chetopa.

"SEC. 3. All payments of money or property made by way of usurious interest, or of inducement to contract for more than twelve per cent per annum, whether made in advance or not, shall be deemed and taken to be *payments made* on account of the *principal*, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid, *without interest*; nor shall any debtor be deemed in equal wrong on account of having paid, or having agreed to pay, such usurious interest or such inducement, but shall have like remedy and relief in either case.

"SEC. 4. Any person contracting, by promissory note, bill of exchange, bond, or otherwise, to receive a greater rate of interest than that allowed by this act, shall forfeit all interest, and shall recover no more than the principal of such note, bill, bond, or other contract."

These sections clearly limited the rate of interest to twelve per cent per annum, and punished the creditor who contracted for more with an entire forfeiture of all interest, at the same time rewarding the debtor with a credit upon the principal debt of so much as he might have paid for interest on a usurious contract. This remained the law until June 20th, 1872, when sections 2, 3, and 4, quoted, were repealed by the act of February 28th, and the following took effect (Laws of 1872, p. 284):

"SEC. 2. The parties to any bond, bill, promissory note, or other instrument of writing, for the payment or forbearance of money, may stipulate therein for interest receivable on the amount of such bond, bill, note, or other instrument of writing: *Provided*, that no person shall recover in any court more than twelve per cent interest thereon per annum.

"SEC. 3. All payments of money or property made by way of usurious interest or inducement to contract for more than twelve per cent per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal *and* twelve per cent interest per annum, and the courts shall render judgment for no greater sum than the balance

Crocker v. National Bank of Chetopa.

found due after deducting the payments of money or property made as aforesaid."

A general denial was filed to the petition, a jury waived, and the cause tried by the court.

McComas & McKeighan, for the plaintiff.

John K. Cravens, contra.

DILLON, *Circuit Judge*.—The usurious transaction in respect of which this action is brought, occurred after the state statute of June 20th, 1872 (Laws of 1872, p. 284), went into operation. This statute, as construed by the supreme court of the state, "allowed parties to contract for any rate of interest they might choose, but did not allow the creditor to recover more than the principal and interest at the rate of twelve per cent per annum." (*Jenness v. Outler*, 12 Kan. 511, per VALENTINE, J.)

On the loans to the bankrupts, the defendant bank contracted for and received interest at the rate of eighteen per cent per annum. If the debtors had not been adjudged bankrupt, could they have recovered under section 30 of the national banking act? (Rev. Stats. secs. 5197, 5198.) If so, does this right of action pass to their assignee in bankruptcy? And if so, what is the extent of the recovery? These are the questions in the case.

1. If the effect of the state statute of June 20th, 1872, was to abrogate all rates of interest—if after that enactment no rate of interest exists or "no rate is fixed by the laws of the state" of Kansas—then national banks would be restricted to seven per cent as the maximum rate they could lawfully charge. (Rev. Stats. sec. 5197; *Tiffany v. National Bank of Missouri*, 18 Wall. 408, S. C. 1 Am. L. T. R. N. S. 158.)

If, however, this was not the effect of that enactment, then twelve per cent is the maximum legal rate allowed by the laws of Kansas. In either event, the defendant bank charged and received an illegal rate. If bankruptcy had not supervened, it is clear that Marsh & Overhuls, the bankrupts, might, under the national banking act (Rev. Stats. sec. 5198), have recovered

Crocker v. National Bank of Chetopa.

from the defendant bank twice the amount of interest paid, as therein provided. Indeed, the right of action is yet *in them* if it is not barred by the two years limitation (Rev. Stats. sec. 5198), unless it has passed to their assignee in bankruptcy.

2. The next question is, *Is* the assignee in bankruptcy their "legal representative" within the meaning of the statute? (Rev. Stats. sec. 5198.) It is our opinion that an assignee in bankruptcy is, in respect of such a claim as this, which has injuriously affected and reduced the estate in bankruptcy, and which is to be enforced "by an action in the nature of an action of debt," peculiarly and most appropriately "the legal representative" of the bankrupt. Every reason which, in case of the death of the debtor, without bankruptcy, would give the right of action to the administrator or executor, as his legal representative, applies with full force to the assignee in bankruptcy, if his estate is during his lifetime administered in a court of bankruptcy. (See *Tiffany v. National Bank of Missouri*, *supra*; 1 Deacon on Bankruptcy [3d ed.], 523, 524; *Beckham v. Drake*, 2 H. L. Cases, 640.)

In this view, it is unnecessary to determine whether the right of action would vest in the assignee under the bankrupt act (Rev. Stats. secs. 5044, 5045, 5046, 5047), though it seems not improbable that the provisions of these sections are comprehensive enough to embrace it. (*Darby's Trustees v. Boatman's Sav. Inst.* 1 Dillon, 141; S. C. 18 Wall. 375.)

Under the English bankrupt act, no right of action passes to the assignee for a mere personal tort to the bankrupt, as for assault or libel, but it is otherwise in respect of injuries or torts which result in diminishing the estate of the bankrupt; and the distinction is taken between rights of action where personal suffering or inconvenience is the primary cause of the action (which do not pass), and where pecuniary loss or damage is the primary cause of action, which do pass. (1 Deacon on Bankruptcy [3d ed.], 522 *et seq.*) This distinction seems to be made in our bankrupt act, which vests in the assignee all such "rights of action."

Crocker v. National Bank of Chetopa.

3. The next question is, Whether the recovery shall be for double the whole amount of interest paid, or only double the amount in *excess* of the legal rate, whether that be seven or twelve per cent? Where an illegal rate of interest is charged, and an action is brought on the contract, the statute declares a "forfeiture of the *entire* interest," and if the usurious interest has been paid, the statute gives an action to recover back, not simply the excess over the legal rate, but "twice the amount of interest thus paid," that is, paid in pursuance of an usurious contract or transaction.

National banks owe a duty to the public to observe the limitations of the act of congress in respect of the rate of interest—limitations wisely imposed, but in many of the western states, at least, very frequently disregarded. They have privileges enough without usurping others. They have powers enough, without exercising those not conferred, or transcending the limits of their charters. They ought not to become usurers; and if they do, public policy is promoted by an enforcement of the penalties which the statute has denounced. It should be borne in mind that the statute confines the action to the person who has paid the illegal interest, or to his legal representative, thus showing that it was in part its purpose to repair this loss or reimburse his estate—there being superadded, for the purpose of preventing such violations of the law, the infliction of a penalty of twice the amount of interest paid. This penalty was, doubtless, supposed by congress to be no more than would be reasonably sufficient to cover the excess of interest over the legal rate, and costs and expenses of litigation, and at the same time make it more profitable to the banks to obey the law than to violate it.

Judgment will be entered for the plaintiff for \$2,219.92, that being twice the full amount of interest paid on the usurious transactions set out in the petition, not barred.

JUDGMENT ACCORDINGLY.

NOTE.—In Pennsylvania there is no general statute limiting the rate of interest which banks, organized under the laws of the state, may take. A number of such banks, by special charter, are authorized to

Re Leavenworth Savings Bank.

charge and receive ten per cent interest—the general legal rate of interest in that state being six per cent. A national bank in that state reserved and received interest at nine per cent: *Held* (construing Rev. Stats. sec. 5197), that it might rightfully contract for interest at the rate of ten per cent per annum, and that the action against the bank for twice the amount of interest paid could not be maintained. (*First National Bank of Mt. Pleasant v. Duncan*, western district of Pennsylvania, before STRONG and MCKERNAN, JJ., June, 1878, 24 Int. Rev. Record, 206.)

Jurisdiction of state courts of actions against a national bank, under section 30 of the national banking act, was asserted and maintained in *Ordway v. Central National Bank*, 47 Md. 217, S. C. Thompson National Bank Cases, 556; *S. P. Blets v. Columbia National Bank*, supreme court of Pennsylvania, MSS. May, 1878. See *Missouri River Telegraph Company v. First National Bank*, 217, S. C. Thompson National Bank Cases, 401; *Newell v. National Bank*, 12 Bush, 57, S. C. Thompson National Bank Cases, 501; 18 Albany Law Jour. 62.

The principal case was cited and followed by GRESHAM, J., in *Wright v. National Bank of Greensburg*, United States circuit court, Indiana, 10 Chicago Legal News (July 20th, 1878), 848.

Re LEAVENWORTH SAVINGS BANK.

Since the amendatory bankrupt act of June 22d, 1874 (18 Stats. at Large, 178), the same proportion of creditors must join in the proceeding to force a corporation into bankruptcy that is required in the case of natural persons.

(Before DILLON, Circuit Judge.)

Bankrupt Act.—Corporations.—Number and Value of Creditors.

IN January, 1876, a petition in bankruptcy was filed by a single creditor against the Leavenworth Savings Bank, alleged to be a corporation organized and existing under the laws of the state of Kansas. An order to show cause was issued and served. On the return day, the bank appeared and moved to dismiss the petition, because it does not show that it is presented by one or more creditors of the bank, who constitute one-fourth in number, and whose debts amount to one-third of the provable debts of

Re Leavenworth Savings Bank.

the bank. The district court sustained this motion, and dismissed the creditor's petition. To reverse this order the petitioning creditor brings the case here by a petition of review.

Clough & Wheat, for the petitioning creditor. They cited and relied on: *In re Oregon, etc. Pub. Co.* 13 Bankr. Reg. 200; *Lamp Co. v. Ansonia, etc. Brass Co.* United States supreme court, October term, 1875, 91 U. S. 656; S. C. 3 Cent. Law Jour. 160, 13 Bankr. Reg. 385.

Lucien Baker, for the bank.

DILLON, *Circuit Judge*.—There is only one question in this case, but it is an important one. It is whether, under the existing law, the same proportion of creditors must join in the proceeding to force a corporation into bankruptcy that is required in the case of natural persons. Section 37 of the original bankrupt act (sec. 5122 of the Rev. Stats.) made moneyed, business, and commercial corporations subject to its provisions, and provided for voluntary and involuntary proceedings the same as in the case of ordinary debtors, except that no allowances were to be made to corporate debtors, and no discharges granted. And it is to be observed that this section (sec. 37) refers, by the nature of its provisions, to the sections of the bankrupt act, such as section 11, as to voluntary proceedings, and sections 39 and 40, as to involuntary proceedings, and sections 35 and 39, as to frauds, preferences, etc.

By the original act any one creditor, whose debts exceeded \$300, could throw his debtor, whether a natural person, a co-partnership, or a corporation, into bankruptcy, if such debtor had committed an act of bankruptcy. The provisions in this respect as to individual debtors, copartners, and corporations, were uniform. In the fall of 1873, what is known as the panic of that year occurred, which resulted in great distress and embarrassment to the monetary and commercial interests of the country. The existing provisions of the bankrupt act, arming a single creditor, in a time of financial stringency, with the terrible power of

Re Leavenworth Savings Bank.

forcing a debtor into bankruptcy, against the wishes and interests of all the other creditors, and to the ruin of the debtor, were felt to be too severe, and this led congress to pass the amendatory act of June 22d, 1874. This act breathes but one spirit. All its provisions are in one direction. Every part of it is intended to relieve the severity of the act as it then stood. What should be deemed acts of bankruptcy was modified, and in every instance made more liberal towards the debtor. This was done by section 12, which amended section 39 of the original act, by substituting therefor an entirely new section. This new section contained the important requirement, in involuntary cases, that one-fourth, at least, of the debtor's creditors, representing at least one-third of the provable debts, must concur in the proceeding. These provisions were made retroactive in the most comprehensive terms, and the language, in this regard, throws no little light upon the question now under consideration. "The provisions of this section shall apply to *all cases of compulsory or involuntary bankruptcy*, commenced since December 1, 1873, as well as to those commenced hereafter. And in *all cases* commenced since the 1st day of December, 1873, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of the petitioning creditors be denied by the debtor," etc., proceed to determine the same, and if the required proportion do not join, "the proceedings shall be dismissed."

It will be observed that no distinction is made or suggested between proceedings against natural persons and proceedings against corporate debtors, but the sweeping language, twice repeated, is "*all cases*," which would include cases against both classes of debtors.

Again, there can be no doubt, as it seems to me, that corporate debtors would be entitled to the benefit of the legislation of 1874 as to what constitutes an act of bankruptcy, and as to what is necessary to make or establish a fraudulent preference. The result, then, is that many of the provisions of section 12 of the legislation of 1874 do apply to corporations. It would be singular if one part of that section applied to corporations and

Re Leavenworth Savings Bank.

other parts did not; and it would require a clear expression of the legislative intent to justify the court in thus construing the act. It is argued that such an intention is manifested by the language of section 5122 of the Revised Statutes. But this is only a re-enactment, with a verbal change, of section 37 of the original act, which, so far as it allows "*any creditor*" of a corporation, without reference to the number and amount of the other creditors, to throw the corporation into bankruptcy, is inconsistent with the legislation of 1874, and is therefore repealed by necessary implication. While it is true that the amended act and the Revised Statutes were passed on the same day, yet it is expressly provided that acts passed subsequent to December 1, 1873, are to have full effect notwithstanding the Revised Statutes. (Sec. 5601.) The amendatory bankrupt act falls within this provision, and there is no ground for claiming that, so far as it is in conflict with the Revised Statutes, the latter must not give way. Indeed, it will be observed that the amendatory bankrupt act does not refer to the Revised Statutes, but to the sections of the original bankrupt act; can it, therefore, be contended that it is void since it referred to sections that were then repealed? Surely not; and it is clear that, so far as there is any repugnance between the new act and the old, the latter must yield.

There is no reason for the alleged difference between the bankruptcy of corporations and natural persons. None had been made in this respect in the original act. Debtors of both classes were within the mischief which the legislation of 1874 was designed to remedy. A large amount of the active business capital of the country is invested in corporate organizations. They largely do business upon credit. Their capital is owned by the shareholders. Creditors as well as stockholders are interested in their successful operation, and bankruptcy is often quite disastrous to both. It cannot readily be believed that congress intended, in a time when it deemed relief from a stringent law necessary, to leave the creditors, and particularly the stockholders in corporations, exposed to its unmitigated severity. It is not the *corporation* that suffers, but its creditors and the owners of its stock.

United States v. Kansas Pacific Railway Company.

Again, the original section 39 applied to bankers, bringing them within the provisions as to involuntary bankruptcy; and the amendatory act of 1874, whose effect is now in question, not only allowed bankers to remain subject to being thrown into bankruptcy, but added, also, for the first time, the words, "*any bank*," which undeniably means a banking institution owned by a natural person, partnership, or joint stock company, and includes, in my judgment, such an institution when it is incorporated.

This conclusion might be strengthened by other considerations, such as the provisions in the bankrupt act (sec. 48, now sec. 5013 of the Rev. Stats.) and section 1 of the Revised Statutes, declaring that the word "person" may include and be applied to corporations, but I do not deem it necessary to enlarge the argument.

AFFIRMED.

NOTE.—This case was cited, and its doctrine expressly approved and followed, in *re Oregon, etc. Pub. Co.* 3 Sawyer, 614, overruling S. C. 13 Bankr. Reg. 200. S. P. *re Detroit Car Works*, 14 *Ib.* 243.

THE UNITED STATES v. KANSAS PACIFIC RAILWAY
COMPANY.

1. Under the act of congress of July 1, 1862 (12 Stats. at Large, 489), construing the charter of the Union Pacific Railroad Company and of the other companies therein named, the United States may recover of the companies receiving its bonds, until such bonds and interest are paid, *five per cent of the net income* earned after the completion of the roads.
2. Such recovery may be had in an action *at law*.

(Before MILLER, Circuit Justice.)

United States v. Kansas Pacific Railway Company.

Charter of Union Pacific Railroad Company.—Right of the Government to Recover Five Per Cent of the Net Earnings of the Company.

DEMURRER TO PETITION. The defendant, formerly the Leavenworth, Pawnee, and Western Railroad Company, was one of the roads aided by the act of congress of July 1, 1862, and the amendatory act of July 2, 1864, relating to the Union Pacific Railroad, and other companies therein named. Bonds of the government were delivered to the defendant as provided in said act, amounting in all, as alleged, to \$6,303,000, payable in thirty years, with interest at six per cent, payable semi-annually. The defendant's road is averred to have been completed November 2, 1869, and that since then to the 31st day of October, 1874, the net earnings of the road have amounted to \$6,176,602.60, and that five per cent of said net earnings, during said period, amount to \$308,830.13. The act of congress of July 1, 1862, provides as follows:

"SEC. 6. The grants aforesaid are made upon condition that said company shall pay said bonds at maturity, * * * and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per cent of the net earnings of said road shall also be annually applied to the payment thereof."

This is a suit at law to recover the said five per cent of the net earnings. The petition alleges the foregoing facts, and a demand and refusal to pay. A demurrer to the petition was filed, under which the following points were made by the defendant, and argued, and submitted to the court at the May term, 1876, before MILLER, circuit justice, viz.:

1. That the provision of the act of 1862, set forth in the

United States v. Kansas Pacific Railway Company.

petition, does not impose any obligation on the company to pay money to the government, but is merely a directory provision, regulating the management of the internal affairs of the company.

2. That if the provision in question does create an obligation binding the company to pay a proportion of its net earnings to the government, such right is of an equitable nature, enforceable only by proceedings for account, and cannot be made the foundation of an action at common law.

The cause was taken under advisement, and at a subsequent day an order was directed to be entered overruling the demurrer, with leave to answer.

J. P. Usher and C. E. Bretherton, for the demurrer.

George R. Peck, district attorney, for the United States.

MILLER, *Circuit Justice*, in directing the entry of an order overruling the demurrer, in substance observed that he had never had any doubt that the demurrer must be overruled, but he had held it up on suggestion of counsel that the argument of the case of the *Union Pacific Railroad Company v. The United States*, on appeal from the court of claims, might involve propositions affecting this case. (1 Otto, 72.) That was a suit brought by the company against the United States, to recover the one-half of the freight earned by the company for carrying mails, etc., for the United States—the government claiming that *all* such earnings should go to pay the interest on the government bonds. That case was recently argued in the supreme court of the United States, and nothing was developed touching the right of the government to recover the five per cent of the net income, after the completion of the road, a right given in the original charter of July 1, 1862, and which in this respect has never been repealed or modified. Let the demurrer be overruled.

JUDGMENT ACCORDINGLY.

Peck v. Miami County.

CLARENCE I. PECK v. THE BOARD OF COUNTY COMMISSIONERS OF MIAMI COUNTY, and CHARLES GILLER, Clerk of said Board, *et al.*

Lands patented to the Indian reservees, under the treaty with the Miami Indians, June 5th, 1854 (10 Stats. at Large, 1092), are liable to be taxed by the state authority after the title has passed from the Indian reservee to a citizen.

(Before DILLON, Circuit Judge.)

Indian Treaty.—Exemption of Land from Taxation.—Duration of Exemption.

ON demurrer to the bill of complaint. The plaintiff seeks to enjoin the collection of certain taxes and for relief against tax sales already made.

The bill and demurrer present the single question: Are the lands described in the bill, and which are the property of the plaintiff, who is a citizen of the United States, not an Indian, and which lands he acquired by regular and legal conveyances from Miami Indians, to whom the same were granted by treaty June 5th, 1854, under such terms as not to be taxable while held by the Indians, taxable by the state of Kansas in the hands of the complainant? The treaty of June 5th, 1854 (10 Stats. at Large, 1092), contains the following: "All selections herein provided for, shall, as far as practicable, be made in conformity with the legal sub-divisions of the United States lands, and immediately reported to the agent of the tribe, with apt descriptions of the same, and the president may cause patents to issue to single persons or heads of families for the lands selected by or for them, subject to such restrictions respecting leases and alienation as the president or congress of the United States may impose; *and the land so patented shall not be liable to levy, sale, execution, or forfeiture: Provided, that the legislature of a state within which the ceded country may be hereafter embraced, may, with the assent of congress, remove these restrictions.*"

The bill is founded upon the proposition that this is a condition

Peck v. Miami County.

or exemption annexed to the land, and runs with it, and passed to the complainant (a citizen of Illinois) by virtue of the conveyance of the land to him.

B. F. Simpson, for the plaintiff.

James D. Snoddy and *W. R. Wagstaff*, for the defendants.

DILLON, *Circuit Judge*.—The only question in the case is whether lands patented to the reservees under the treaty with the Miami Indians of June 5th, 1854 (10 Stats. at Large, 1092), are exempted from taxation under the authority of the state of Kansas, after the title has passed from the Indian patentee, and become vested in a citizen. The plaintiff is the owner of certain land by title derived from an Indian patentee under the treaty. The treaty contained a provision that the lands patented to the reservees “shall not be subject to *levy, sale, execution, or forfeiture.*” It is settled that while these lands remained the property of the Indian reservees, they are exempt, by the true construction of the above clause in the treaty, from taxation by the state. (*Kansas Indians*, 5 Wall. 760.) Does this exemption continue after the Indian has aliened the lands to a citizen? This is the only question. It has been argued by counsel with marked ability, but I do not consider it necessary to discuss it *in extenso*. It has been thoroughly considered in the supreme court of Kansas (*Commissioners of Miami County v. Brackenridge*, 12 Kansas, 144), and decided against the position on which the plaintiff’s bill rests. True, the decision of that court on such a question has no authoritative weight here, but the reasons for its judgment are so well stated, and are so satisfactory to my mind, that I content myself with referring to the opinion of BREWER, J., as expressing the views which I have formed upon considering the arguments presented by the respective counsel in the case before me. The demurrer is sustained, and the bill dismissed.

DECREE ACCORDINGLY.

NOTE.—See *Mackey v. Coxe*, 18 How. 100; *Mungosah v. Steinbrook*, 3 Dillon, 418; *Gray v. Coffman*, 3 Dillon, 398; *United States v. Payne*, *post*.

Guernsey v. Burlington Township.

GEORGE A. GUERNSEY v. BURLINGTON TOWNSHIP.

Negotiable bonds made by the defendant township, under legislative authority, reciting that they are issued "for the purpose of aiding internal improvements in said township," are valid in the hands of a holder for value, although they may have been in fact issued to aid in the improvement of a water-power and the erection of a water-mill owned by private persons.

(Before DILLON, Circuit Judge.)

*Internal Improvement Bonds.—Bonds to aid Erection of
Water-Mill.*

THIS is an action upon bonds and coupons. The following is a copy of one of the bonds:

"United States of America.

"\$500.00. *Bond of Burlington Township.* No. 9.

"County of Coffey, State of Kansas.

"Burlington township, in the county of Coffey, state of Kansas, promises to pay D. Cross & Sons or order the sum of five hundred dollars, on the 5th day of March, A. D. 1874, and interest thereon at the rate of ten per cent per annum, payable annually, upon presentation of the coupons therefor hereto attached; both principal and interest payable at the banking house of Bates & Brown, in the city of New York.

"This bond is one of an issue of ten thousand dollars, made for the purpose of aiding internal improvements in said township, and in pursuance of an act of the legislature of the state of Kansas, entitled 'An act to authorize Burlington township, in the county of Coffey, to issue bonds,' which act became a law on the 2d day of March, A. D. 1871.

"In testimony whereof, the township trustee, clerk, and treasurer have caused this bond to be issued, duly signed, attested and countersigned, this 5th day of March, A. D. 1871.

"CHARLES MORSE, Trustee.

"Countersigned: H. L. JARBOE, Treasurer.

"Attest: G. N. McCONNELL, Clerk."

Guernsey v. Burlington Township.

This bond is endorsed, "David Cross & Sons."

The first section of the act recited in the bond is as follows :

"SECTION 1. That the trustee, treasurer, and clerk of Burlington township, in the county of Coffey (or any two of them), be and they are hereby authorized and directed to issue the bonds of said township to the amount, to the persons, for the purposes, and upon the terms and conditions named in the order and proclamation of said township officers in calling said election of January 11, A. D. 1871, notwithstanding any irregularities or want of authority in law for making the orders and calling the election aforesaid, or whether the said orders and election have been in compliance with the laws of Kansas or not. Said bonds to be payable at such place as may be designated on their face."

The other sections provide for levying and collecting a tax to pay the bonds. This act went into effect March 2, 1871.

The question submitted to the electors on the said 11th day of January, 1871, referred to in said act, was whether the township of Burlington, for the purpose of aiding D. Cross & Sons in the improvement of their water-power and mill privileges at or near the town of Burlington, and the putting in operation a flouring mill at or near said town, will issue the bonds of the township to D. Cross & Sons to the amount of \$10,000, payable in one, two, three, four, and five years, with ten per cent interest, on condition, 1st, that the legislature, at the regular session in 1871, shall authorize the issue of said bonds; and, 2d, that Cross & Sons shall execute and secure to the said township five notes for \$2,000 each, payable in one, two, three, four, and five years, saying nothing about interest.

The proposition carried by a large majority, January 11, 1871. Afterwards the act recited in the bonds in suit was passed. On February 27, 1871, Cross & Sons executed the five notes to the township, and secured the same by a mortgage on the mill and mill property, and thereupon, March 5, 1871, the bonds in suit were issued and negotiated.

The said Cross & Sons paid the first two notes to the township and no more, and the township applied the amount in pay-

Guernsey v. Burlington Township.

ment of part of its bonds. The answer alleges that the said mill is situate upon the Neosho river, and is operated by water-power obtained by means of a dam erected and maintained by said Cross & Sons, under chapter 66 of the general statutes of Kansas, approved February 6, 1867; that the owners of said mill ground all grain brought to it; but, other than the transaction herein set forth, said township has no interest in the mill and no control over the same. The second count of the answer alleges the foregoing facts, but does not allege any actual notice thereof to the plaintiff. The case was submitted to the court on a demurrer to the second count of the answer. The demurrer was on the ground that the facts stated in the second count of the answer constituted no defence to an action on the bonds in the hands of a holder for value before due, which the plaintiff, in his petition, alleged himself to be.

A. L. Williams, for the plaintiff.

A. M. F. Randolph, for the defendant.

DILLON, *Circuit Judge*.—The bond recites that it is made and issued "for the purpose of aiding *internal improvements* (not stating what) in said township," and "in pursuance of the act entitled 'An act to enable Burlington township to issue bonds,' which became a law on the 2d day of March, 1871." The act here referred to does not state on its face the purpose or object of the bonds which it authorizes and directs to be issued. This can only be learned by reference "to the orders and proclamation of the said township officers in calling the said election of January 11, 1871." In its circumstances, in this regard, the case is peculiar, and I am not clear that the purchaser is bound to take notice of the order and proclamation. Inasmuch as the bond states that it is issued to aid "internal improvements in the township," and as the general legislation of the state shows that "internal improvements" mean such public improvements as may legitimately be aided by taxation, I am inclined to think that the purchaser may assume, without inquiry, *aliunde* the

Guernsey v. Burlington Township.

bond and legislative act, that the bond is within the competency of the legislature to authorize (Gen. Stats. of Kansas, 526). If this is so, it is clear that the answer, which does not charge actual notice to the plaintiff, contains no defence to the action. It may also be remarked that the legislature of Kansas authorizes in favor of *water-mills* the exercise of the power of eminent domain (Gen. Stats. Kansas, 576). There is a line of decisions, perhaps exceptional in character and open to some doubt as to their *present* soundness, which sustains the validity of such legislation. (Cooley Const. Lim. 534, 536.) It seems quite probable, from the reasoning of the supreme court of Kansas in *Leavenworth County v. Miller* (7 Kansas, 523, *et seq.*), that that court would sustain the validity of a legislative act authorizing compulsory aid to erect and maintain a water-mill. In that case the court says "no instance can be shown where the government may aid a thing by the power of eminent domain where it cannot also aid it by taxation." (*Ib.* 527.)

Since the foregoing was written, the supreme court of the United States has decided the case of the *Township of Burlington v. Beasley*, October term, 1876 (4 Otto, 310), holding that bonds issued under the act of 1872 (Laws 1872, chap. 68), to aid in the erection of a *steam* custom grist-mill, not situated on a water-course, or operated by water-power, were valid, and such mills were "works of internal improvements" within the meaning of the act. That decision, in effect, determines this case, for it is clear that if *steam* custom grist-mills may be lawfully aided by taxation, then such mills operated by water-power may be similarly aided. If there is any distinction between the two classes of mills in this regard, under the line of decisions before adverted to, the distinction is in favor of mills operated by water-power. Our judgment is that the second count of the answer is insufficient.

JUDGMENT ACCORDINGLY.

NOTE.—No further answer was made, and the plaintiff had judgment.

Re Scrafford.

Re SCRAFFORD.

Creditors who have obtained liens by attachment within four months before the commencement of proceedings in bankruptcy, are not to be reckoned in computing the proportion of creditors who must unite in an involuntary petition.

(*Before DILLON, Circuit Judge.*)

Bankrupt Act.—Number and Value of Creditors.—Attaching Creditors.

THE case is stated in the opinion.

Judson & Motter, attorneys for petitioning creditors.

J. E. Taylor, A. Wells, and Doniphan & Reed, *contra*.

DILLON, *Circuit Judge*, in delivering his opinion, orally, in substance said: This case is before me on a petition to review the action of the district court, and the facts are as follows:

Isaac T. Hosea filed his petition for adjudication of bankruptcy against Charles G. Scrafford, alleging, among other things, that he constituted one-fourth in number of the creditors, and that his claim was one-third in amount of the indebtedness of the alleged bankrupt. This was denied by Scrafford, who appeared by attorney and filed a list of his creditors, with a statement of his indebtedness. Certain other creditors then appeared, alleging that they had levied attachments on the debtor's property within four months before the commencement of the proceedings, and asked leave to oppose the adjudication. This leave was granted them, and the court proceeded to inquire into the number of creditors, and the amounts of their respective claims; whereupon it was moved, on the part of the petitioning creditors, that all persons who held such attachments be excluded from the count as to the number of creditors and amount of indebtedness necessary to be joined in the petition. This motion was overruled by the district court (3 Cent. Law Jour. 252, 14 Bankr.

Re Scrafford.

Reg. 184), and notice being given of the proposed filing of a petition for review, the case was stayed at this point, and no further proceedings have since been had.

One object of the bankrupt law is to secure an equal distribution of the estate of the bankrupt amongst all of his unsecured creditors, and in order the more effectually to accomplish this, creditors who have obtained preferences are excluded from participation in the proceedings until after the election of an assignee. I can see no reason why attaching creditors should not be governed by the same rules which apply to other creditors, whose debts are secured by preferences which the adjudication will defeat. Indeed, as all attachments levied within four months before the filing of the petition in bankruptcy would be dissolved, *ipso facto*, by an assignment under the bankruptcy proceedings, persons holding liens by such attachments would seem to have a peculiar interest in defeating an adjudication, and for this reason should not be reckoned, for the purposes of those proceedings, as creditors of the alleged bankrupt. Of course, they could not be counted if the attachments were sued out with a view of obtaining a preference over other creditors; and as, in most cases, a ground of attachment is also an act of bankruptcy, the presumption would be strong that such was the object of an attaching creditor. A person with a knowledge that his debtor has committed an act of bankruptcy, should not be permitted to obtain by attachment and hold a preference over other creditors. I do not think that creditors, any more than the debtor, should be permitted thus to defeat the object of the bankrupt law. A secured creditor cannot vote for assignee, nor can he have his debtor adjudged a bankrupt. If he cannot be counted in favor of the proceedings to put the debtor into bankruptcy because he is secured, there is no principle upon which he could be counted against them.

My conclusion, therefore, is, that when a creditor of an alleged bankrupt, either by an arrangement with the bankrupt, or by an attachment, obtains a security or lien for his claim, in fraud of the bankrupt act, *or which would be avoided by that act if the*

Meier v. Kansas Pacific Railway.

debtor is adjudged a bankrupt, he cannot be counted, nor can his claim be estimated in computing the number and value necessary to be represented in the petition.

REVERSED.

NOTE.—This case overrules S. C. 3 Cent. Law Jour. 252, 14 Bankr. Reg. 184; *contra*, *Re Hatje*, 12 Bankr. Reg. 548. See *Re Broich*, 15 *Ib.* 11; *Re Frost*, 11 *Ib.* 69; *Re Green Pond R. R. Co.* 13 *Ib.* 118.

As to dissolution of attachment by bankruptcy proceedings: *Bracken v. Johnston*, *post*; *McCord v. McNeil*, *ante*.

Attachment creditor cannot force debtor into bankruptcy: *Re Hasens*, *post*.

ADOLPHUS MEIER *et al.* v. KANSAS PACIFIC RAILWAY *et al.*

Whether the United States can compulsorily be made a defendant to a foreclosure bill where it holds a lien or mortgage on the property in respect of which the foreclosure is sought, *quære?*

(*Before* MILLER and DILLON, JJ.)

Suits against the United States.

THE bill which was originally filed in the state court seeks to foreclose a mortgage on the railway and property of the Kansas Pacific Company—one of the companies aided by congress in what is known as the Pacific system of railroads. The United States, under the legislation of congress, has certain rights in and liens on the property, and was made a defendant to the bill, but has entered no appearance. After the suit was removed to this court, the complainants' solicitor made the application set forth in the opinion of the court.

J. P. Usher, for the motion.

Per Curiam, MILLER and DILLON, JJ.—The solicitor for the complainants has filed in this court the following motion:

"Complainants move the court that a motion, under the seal of this court, be issued, respectfully addressed to the attorney-

Meier v. Kansas Pacific Railway.

general of the United States, notifying him that a suit has been instituted against the United States of America in this court, accompanied by a copy of the petition or bill of complaint, and requesting the attorney-general to appear and state whether the United States of America claim any rights in the premises which are the subject matter of this action, and whether the United States desire any adjudication of their rights in the premises to be made, and to show cause, if any he has, why the prayer of the bill shall not be granted.

“J. P. USHER,
“*Solicitor for Complainants.*”

In support of this application, the complainants' solicitor has referred the court to the case of *Elliot v. Van Voorst et al.* 3 Wall. Jr. 299, in which the late Mr. Justice GRIER held that a mortgagee may have an effectual decree of foreclosure where the United States is the owner of the equity of redemption, on a notice given in such manner as the court may prescribe, if the land be not held for government purposes.

We grant the motion for which the complainants ask, but we do not thereby commit the court to the proposition that it can, on the final hearing, pronounce a decree against the United States without an authorized appearance by the attorney-general. This question is reserved. That officer, on being notified of this order, can take such action as he may be advised by asking the direction of congress, or by appearing or declining to appear in the cause on behalf of the United States. Let an order be entered and served in conformity with the motion.

ORDERED ACCORDINGLY.

NOTE.—Subsequently the attorney-general directed the district attorney to apply for leave for the United States to enter its appearance and to plead.

Ex parte Hebard.

Ex parte HEBARD.

1. The title to the land constituting the military reservation of Fort Leavenworth, in Kansas, has always been in the United States: in 1875, at the instance of the secretary of war, the legislature of the state passed an act ceding exclusive jurisdiction to the United States over all territory included within the reservation: congress never expressly assumed this jurisdiction: subsequently a larceny was committed on the reservation: *Held*, that the jurisdiction over the offence was in the courts of the general government, and not in those of the state of Kansas.
2. Section 8 of article I. of the constitution of the United States, construed; and it was held that, whenever the United States is the owner of the land it uses as a fort, etc., the legislature of the state may permit congress to exercise exclusive jurisdiction over such land.

(*Before* MILLER, Circuit Justice.)

Jurisdiction over Military Reservation of Fort Leavenworth.—
Art. I., Sec. 8, of the Constitution of the United States, Con-
strued.—Habeas Corpus.—Practice.

MR. THOMAS P. FENLON, an attorney of this court, presented the petition of Samuel Hebard for the allowance of a writ of *habeas corpus*. The petitioner was charged with larceny, committed in 1877, on the military reservation of Fort Leavenworth, and was held to answer by a commissioner of the circuit court of the United States for the district of Kansas, and committed for want of bail. The question involved was, whether the federal courts have jurisdiction of offences of this character committed on the reservation, or whether the jurisdiction is in the courts of the state.

On the 22d day of February, 1875, the general assembly of the state of Kansas, at the instance of the secretary of war (Rev. Stats. sec. 1838), passed the following act:

Ex parte Hebard.

"CHAPTER LXVI., LAWS 1875.

"FORT LEAVENWORTH MILITARY RESERVATION.

"AN ACT to cede jurisdiction to the United States over the territory of the Fort Leavenworth Military Reservation.

"*Be it enacted by the Legislature of the State of Kansas:*

"SECTION 1. That exclusive jurisdiction be and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation, known as the Fort Leavenworth reservation, in said state, as declared from time to time by the president of the United States, saving, however, to the said state the right to serve civil or criminal processes within said reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state but outside of said cession and reservation; and saving, further, to said state, the right to tax railroad, bridge, and other corporations, their franchises and property, on said reservation.

"SEC. 2. This act shall take effect and be in force from and after its publication once in the *Kansas Weekly Commonwealth*.

"Approved February 22, 1875."

No act of congress assuming the jurisdiction thus ceded has been passed. The ownership of the land constituting the reservation has always been, and now is, in the United States. The constitution of the United States provides that "congress shall have power to exercise exclusive legislation, in all cases whatsoever," over the district of Columbia, "and to exercise like authority over all places purchased by consent of the legislature of the state in which the same shall lie, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." (Art. I., sec. 8.)

The questions made appear in the opinion.

Mr. Fenlon, for the petitioner.

Mr. Peck, district attorney, *contra*.

Ex parte Hebard.

MILLER, *Circuit Justice*.—This is an application for a writ of *habeas corpus*, on behalf of Samuel Hebard. The petitioner states that he is held a prisoner for want of bail, under a commitment on a charge of larceny, the order committing him to the custody of the United States marshal having been made by Samuel D. Lecompte, a commissioner of the circuit court of the United States. It appears, very clearly, that the offence for which plaintiff is held to bail was committed on the military reservation of Fort Leavenworth, and the only question in the case is, whether the officer of the United States who ordered the imprisonment of the petitioner had jurisdiction of the case. This is asserted by the district attorney, on the ground that Fort Leavenworth is within the exclusive jurisdiction of congress, under the provision of the constitution on that subject.

This jurisdiction is denied by counsel for petitioner, and as this is the only question in the case, and all the facts necessary to its decision are before us, it can be as well disposed of on the application for the writ as on a return to the writ when issued.

What constitutes the military reservation of Fort Leavenworth is now, and has been the property of the United States ever since the country of which it is a part was purchased from France. There is not, and never could be, any consent of the state of Kansas to that purchase, literally speaking, because the state of Kansas had no existence for fifty years after that transaction, and her consent, since she became a state, could in no way affect that purchase, or the title by which the United States holds the reservation.

The *locus in quo* had a military fort on it, and had been reserved for military purposes for many years before Kansas was admitted into the Union as a state, but when congress passed the law by which the state was created, it included this reservation within the boundaries of the state, and made no exception, as regards this piece of land, of the sovereign rights of jurisdiction which it ceded to the state in that transaction. The effect of this, as this court held in *United States v. Stahl*, Woolworth, 192, was that, while the title and right of use for all lawful purposes

Ex parte Hebard.

remained in the United States, as it did in all its other land in the state, the political jurisdiction passed to the state of Kansas.

If matters had remained in this condition to the present time, there can be no doubt that the warrant under which the prisoner is now held would be void, because the jurisdiction of the offence would be in the state, and not in the federal government. But on the suggestion of the war department of the federal government to the authorities of the state of Kansas, the legislature passed a law, approved February 22, 1875, granting to the United States exclusive jurisdiction over the military reservation, and if this act is effective for that purpose, the writ must be denied.

It is objected that the legislature has no constitutional power to part with its jurisdiction over any part of the soil within the boundaries of the state. Unless the act in question is within the purview of section 8, article I., of the constitution of the United States, it is unnecessary to inquire further as to its validity. If it is, then it is valid, for the reason that the constitution has expressly conferred on the legislatures of the states the right to give consent to such jurisdiction. It is also urged that some act of congress assuming this jurisdiction is necessary, even if the statute of Kansas be valid; but I am of opinion that when the *locus in quo* is under the control of the United States and is used as a fort, magazine, or other purpose mentioned in the constitution, the laws of the United States, framed for such places, become the law of these places upon the consent of the state lawfully given for that purpose.

We then come to the question whether this act, conferring jurisdiction, passed by the state of Kansas, is within the meaning of the constitutional provision referred to—"congress shall have power to exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased by consent of the legislature of the state in which the same shall be, for the erec-

Ex parte Hebard.

tion of forts, magazines, arsenals, dock-yards, and other needful buildings." If the consent of the state to the act of buying the land, or acquiring the title to it, is all that can be considered in construing this provision, then, as we have already said, the state of Kansas has never given any such consent. But if this is a form of expression whose true meaning is that the general government, as respects lands needed for forts, etc., may, whether such lands are owned by it or shall be purchased from others, exercise exclusive jurisdiction, whenever the consent of the legislature of the state to the exercise of such jurisdiction shall be given, then the legislature of Kansas, in the act referred to, has given the consent required by the federal constitution. As this court remarked in the case of the *United States v. Stahl*, it can hardly be supposed that the constitution intended to make the consent of a state necessary to its power to erect forts, etc., in that state, nor to the acquisition of title to land used for that purpose. Such a proposition would be placing the military power of the government, which in every other respect is so ample, at the mercy of the states as regards forts, arsenals, etc. A similar remark will apply to buildings for post-offices, court-houses, etc. It is impossible to believe that the constitution intended to restrict the right of eminent domain, and to declare that in any such instance the consent of the state is necessary to the validity of a purchase for such purpose. If, however, we suppose that in many such cases it would be desirable for the national government to hold such places free from the general jurisdiction which the state in all other cases exercises within her boundaries, but that she shall not be ousted of that jurisdiction except by her own consent, and that this consent shall be given by her legislature, we have at once a motive and a reasonable explanation of the purpose of the provision of the constitution. The consent of the state being necessary for no other purpose than that of plenary jurisdiction in the federal government, it is consent to this which is provided for in the constitution.

This consent may be given whether the land is purchased in the common meaning of that word or not, and may be given

Ex parte Hebard.

either before or after title is acquired by the United States. The elements necessary to render valid this consent to the exercise of federal jurisdiction are, title in the United States and possession for one of the purposes mentioned in the constitution. In 6 Opinions of Attorneys-General, 577, many of the statutes of the states granting this exclusive jurisdiction are examined, and their language criticised, and in very few instances is any expression of consent to the *purchase* used, but a direct and express grant of jurisdiction, with occasional qualifications on that point. This is an implied construction, that the thing to be granted by the state is her consent to the exercise of jurisdiction, and not to the mere purchase which is provided for in the constitution.

The constitution was adopted at a time when the federal government owned no land. Hence, when it desired any it must pay for it, whatever might be the uses to which it was appropriated. It was, therefore, a very natural form of expression to say that when the legislature gave consent to the purchase for such and such purposes, the United States should exercise exclusive jurisdiction. Did they mean that if the United States should become the owner of land which it desired to use for such purposes, the legislature could not grant jurisdiction also, if within her limits? or is it but a just construction of the clause, that whenever the United States is the owner of the land which it uses for a fort or arsenal, the legislature of the state, by its own consent, may permit congress to exercise exclusive jurisdiction over such land?

I think the latter the more reasonable construction, and the writ is denied.

WRIT DENIED.

Payson v. Coffin.

PAYSON, Assignee, v. COFFIN.

1. The two-years limitation provision in the bankrupt act applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property.
2. Suits may be brought in the circuit courts of the United States, by assignees in bankruptcy, without reference to the amount or value in controversy.

(Before MILLER, Circuit Justice.)

Bankrupt Act.—Statute of Limitations.—Jurisdiction of Circuit Court.—Amount.

ACTION by Payson, assignee in bankruptcy of the Republic Insurance Company, of Chicago, to recover a *second* assessment or call from the defendant as a stockholder in the bankrupt company. Plea: that no cause of action hath accrued against the defendant within two years next before the commencement of this suit. Demurrer to plea.

Mr. Howell, for the plaintiff.

Mr. Wheat, for the defendant.

MILLER, *Circuit Justice*, orally delivering his judgment, held:

1. That the plea of the statute of limitations was sufficient in point of form.

2. That the plea was good in substance; in other words, the two years limitation in the bankrupt act applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property.

3. Whether the cause of action accrued until the *second* assessment (the one in suit) was made by the bankruptcy court, is a question which does not legitimately arise on the demurrer to the plea of the statute of limitations. Demurrer to the plea of the statute of limitations overruled.

It was also held by Mr. Justice MILLER (the circuit judge concurring), on a demurrer to the petition in another case, that

United States v. Payne.

assignees in bankruptcy, under the bankrupt act as amended June 22d, 1874, if not before, may sue in the circuit courts of the United States to collect assets and debts due the estate, without reference to the amount claimed; that the limitation of \$500 in the act of March 3d, 1875, as to the general jurisdiction of the circuit courts, does not apply to such suits.

NOTE.—See *Walker, assignee, v. Towner, ante*, p. 165. Limitation applies to causes of action which existed before the bankruptcy, as well as to those which arise after. (*Norton v. De La Villebeuve*, 13 Bankr. Reg. 304.) Conflicting decisions cited, Frank, Bankr. Act (3d ed.), p. 41, note 86.

UNITED STATES v. BENJAMIN T. PAYNE.

1. Without the assent of the general government, the probate courts of a state have no jurisdiction to administer upon the property or credits of Indians who were members of a tribe which maintains towards the United States its tribal relations.
2. The grant of administration on the estate of a member of the Pottawatomie tribe of Indians, by a probate court in Kansas, by virtue of the treaty of 1867 (15 Stats. at Large, 536, art. VIII. of senate amendments), when such member is in fact alive, is void as respects the administrator, and money paid to him by the United States in that capacity may be recovered back.

(Before DILLON, Circuit Judge.)

Jurisdiction of Probate Court over the Property of the Pottawatomie Indians under the Treaty of 1867 (15 Stats. at Large, 536).—Grant of Administration where the Supposed Intestate is Alive.—Action for Money had and received.

THIS cause is submitted to the court upon the facts set forth in the petition, answer, and reply, which are severally admitted to be true.

The petition states that, on June 10th, 1871, the defendant was indebted to the plaintiff in the sum of \$6,111.84, for money

United States v. Payne.

before that time had and received by the defendant, to and for the use of the plaintiff.

The answer states, "that, in January and May, 1871, the defendant was duly appointed by the probate court for Wabaunsee county, Kansas, administrator of the following named deceased persons: In-kuh-da-o-ks, Go-she-was-kpa-zo-mah, etc. (naming several other Indians having like names), and as such duly qualified; that said several persons were Pottawatomie Indians, and were, at the times of their several deaths, members of the Pottawatomie tribe or nation of Indians, and each owned real estate in said county, and were entitled to receive from the government of the United States, under treaty stipulations, \$661.18, amounting in all to \$6,611.80; that said sum was duly paid by the United States to this defendant, as such administrator; that defendant has duly accounted to the said probate court, and paid out under its direction, of the said moneys received from the United States, the sum of \$4,271.22, and holds the balance subject to the orders of jurisdiction of the said probate court; that defendant has never received any other moneys of the United States."

The replication states that the said Indians mentioned in the answer were alive, and members of the said tribe, at the time the defendant was appointed as administrator. The senate amendment to article VIII. of the treaty of 1867, with the Pottawatomie tribe of Indians, is as follows:

"Where allottees, under the treaty of 1861, shall have died, or shall hereafter decease, such allottees shall be regarded, for the purpose of a careful and just settlement of their estates, as citizens of the United States, and of the state of Kansas; and it shall be competent for the proper courts to take charge of the settlement of their estates, under all the forms, and in accordance with the laws of the state, as in the case of other citizens, deceased," etc. (15 Stats. at Large, 536.)

George R. Peck, district attorney, for the United States.

Martin & Case, for the defendant.

United States v. Payne.

DILLON, Circuit Judge.—It is admitted that the several Indians for whose estates the defendant was appointed administrator by the local probate court, were, at the time of such appointment, in full life, and members of the Pottawatomie tribe of Indians, and that the money received by the defendant of the United States was due to them by the United States under treaty stipulations with the tribe.

Where Indians maintain the tribal relations, their property is not subject to the laws of the state, or their estates to be administered upon in the probate court of the state, unless by the assent of the general government. (*The Kansas Indians*, 15 Wall. 737, 757, 759; *Mackey v. Coxe*, 18 How. 100; *Mungosah v. Steinbrook*, 3 Dillon, 418; *Gray v. Coffman*, 3 Dillon, 393.)

It will be conceded, for the purposes of this case, that the senate amendment to article VIII. of the treaty of 1867, gave the probate court the authority to appoint administrators and settle the estate of deceased allottees of the tribe. But it gave the probate court no authority to appoint administrators of an Indian, unless he had been an allottee under the treaty, and was dead.

The weight of judicial opinion would seem to be in favor of the proposition, even if the Indians and their property were subject to the probate jurisdiction of the courts of Kansas, that the court had no jurisdiction, and could have none, to make an appointment of an administrator of a person who, at the time, was alive. (*Jochumsen v. Suffolk Savings Bank*, 3 Allen [Mass.], 87; *Griffith v. Frazier*, 8 Cranch, 9, 23; *Fisk v. Norvel*, 9 Texas, 13. *Contra*, by the court of appeals of New York, in *Roderigas v. East River Savings Bank*, 15 Am. Law Reg. [N. S.] April, 1876, p. 205, where the note in disapproval, by the late Judge REDFIELD, may be found.) Much may be said on both sides of the general proposition last stated. *Roderigas v. East River Savings Bank*, just cited, may, possibly, be distinguished on solid grounds from such a case as the one before us. It was there held that a payment by a debtor in good faith to an administrator was valid, and would protect the debtor against a second payment, although

United States v. Payne.

the supposed intestate was alive at the time, and the letters of administration were subsequently revoked for this reason. The debtor was innocent, and acted on the faith of the grant of administration of the proper court. It may be a different question when it arises between an innocent third party and the administrator himself, which is the present case. It is possible that the case in the court of appeals of New York may be sustained on this ground, but we need not express any opinion on this point. We place our judgment in the case at the bar on the ground that under the treaty the probate court had no jurisdiction to make an appointment of an administrator for Indians who were alive at the time, and that its decision that it had jurisdiction, evidenced by the grant of letters of administration, is *not conclusive in favor of the administrator*, who, perhaps, had himself appointed, and who, at all events, voluntarily assumed that character, and held himself out to the world as sustaining that relation.

As the government owed this money to these Indians; as the defendant had no right to receive it; as the payment to the defendant did not absolve the government from the liability or duty to pay the amount to the Indians entitled thereto; and as the defendant, if he did not, indeed, apply for, voluntarily accepted and undertook to act as administrator, and does not claim that he has paid the money to the Indians entitled, or that the latter have ever ratified or confirmed the receipt of the money or its disposition by him, our judgment is that the United States may maintain this action to recover back the amount unlawfully received by the defendant.

JUDGMENT FOR THE PLAINTIFF.

Langdon v. Joy.

LANGDON v. JOY.

Rights of "actual settlers" upon the Cherokee neutral lands purchased by the defendant Joy (see *Holden v. Joy*, 17 Wall. 211), under the 17th article of the treaty of July 19, 1866, as amended, considered; and it was held that an actual settler, whose rights were perfect at the date of the ratification of the treaty, could sell his improvements and rights to another, and that the bill made a case showing in the plaintiff an equitable title to the land in question.

(Before MILLER and DILLON, JJ.)

Cherokee Neutral Lands.—Rights of Actual Settlers under the Treaty of July 19, 1866.

JAMES F. JOY commenced in this court an action of ejectment against the present complainant for one hundred and sixty acres embraced in the purchase by Joy of the Cherokee neutral lands. This is a suit in equity against Joy, asserting that the complainant is the equitable owner of the one hundred and sixty acres of land in question, and asking to enjoin the prosecution of the ejectment action until the present suit is determined, and praying that Joy may be decreed to hold the land in trust for the complainant. This is a case brought to test the rights of actual settlers on the Cherokee neutral lands, who are similarly situated to the complainant.

The question in this case depends upon a construction of the 17th article of the treaty between the United States and the Cherokee Nation of Indians, concluded July 19th, 1866, and amended July 31st, 1866. That article is in these words:

"The Cherokee Nation hereby cedes, in trust to the United States, the tract of land in the state of Kansas which was sold to the Cherokees by the United States, under the provisions of the 2d article of the treaty of 1835; and also that strip of the land ceded to the Nation by the 4th article of said treaty which is included in the state of Kansas; and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said state.

Langdon v. Joy.

"The lands herein ceded shall be surveyed as the public lands of the United States are surveyed, under the direction of the commissioner of the general land office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee national council, and one by the secretary of the interior, and, in case of disagreement, by a third person, to be mutually selected by the aforesaid appraisers. The appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements.

"And the secretary of the interior shall from time to time, as such surveys and appraisements are approved by him, after due advertisement for sealed bids, sell such lands to the highest bidders for cash, in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value: *Provided*, that whenever there are improvements of the value of fifty dollars made on the lands not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such person owning and in person residing on such improvements, shall, after due proof, made under such regulations as the secretary of the interior may prescribe, be entitled to buy, at the appraised value, the smallest quantity of land in the legal sub-divisions which will include his improvements, not exceeding in the aggregate one hundred and sixty acres; the expense of survey and appraisement to be paid by the secretary out of the proceeds of the sale of said land: *Provided*, that nothing in this article shall prevent the secretary of the interior from selling the whole of said neutral lands in a body to any responsible party, for cash, for a sum not less than eight hundred thousand dollars."

This article was amended by striking out the last proviso in article 17, and inserting in lieu thereof the following:

"*Provided*, that nothing in this article shall prevent the secretary of the interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the

Langdon v. Joy.

United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre."

In a supplemental article to this treaty, concluded April 27, 1868, it was provided that Joy should take only the residue of said lands after securing to "actual settlers" the lands to which they were entitled under the provisions of the 17th article, and amendments thereto, of the said Cherokee treaty of August 11th, 1866, and that the proceeds of the sale of said lands so occupied at the date of said treaty by "actual settlers," shall enure to the sole benefit of, and be retained by the secretary of the interior as trustee for, the said Cherokee Nation of Indians.

At the time when the treaty of July 19th, 1866, was ratified and proclaimed, one Vaughan was an actual settler upon the one hundred and sixty acres here in controversy, and had made improvements thereon of the value of fifty dollars. It is not necessary to state the rights of Vaughan more fully, because it is conceded that the bill shows that if Vaughan had remained the owner of the improvements, he would have been entitled to the benefit of the provisions of the treaty in respect to actual settlers. But on the 28th day of August, 1866, Vaughan sold his interest in the land and improvements to the present plaintiff, who took possession January 12, 1867, and has ever since remained in possession, and has made valuable improvements thereon. The bill shows that the plaintiff possesses the qualifications of a pre-emptor of the public lands, and that in 1867 the secretary of the interior appointed a commissioner, and the Cherokee Nation appointed another, under the 17th article of the treaty, to receive proof of settlement, ownership of improvements, and occupancy of lands under said article, with power to give persons making such proof a certificate of the right to purchase; that said commissioners appraised the land in controversy at two dollars per acre; that the plaintiff went before the commissioners, and, both in behalf of Vaughan and of himself, offered the proof prescribed by the rules and regulations of the secretary of the interior, and to pay all fees required by law and necessary to obtain a certificate, but that the commissioners

Langdon v. Joy.

refused to receive the same, on the ground that no other person except the said Vaughan had the right to make the said proof or receive the said certificate, and on the ground that Vaughan could not sell his improvements or the plaintiff purchase the same. The bill shows that the land in question is included in the patent of the defendant Joy, and it brings into court the two dollars per acre for him, and prays that he may be decreed to hold the title in trust for the plaintiff and general relief.

The defendant demurred to the bill, and on this demurrer the cause was submitted to the court.

McComas & McKeeghan, for the plaintiff.

Blair & Pratt, for the defendant.

DILLON, *Circuit Judge*, delivered orally the opinion of the court, in substance, as follows: It is conceded in the argument that if Vaughan had remained on the land he would have been entitled to the benefit of the provisions of the treaty in favor of actual settlers. His rights were complete and in full force at the time the treaty of 1866 was ratified and proclaimed. But after this date he sold his improvements and rights in the land to the present plaintiff.

Substantially two objections are made by the defendant to the plaintiff's right to the land. The one is that Vaughan had no power to sell the improvements to the plaintiff, and that the plaintiff did not, therefore, succeed to his rights in respect thereto. The other is that the decision of the commissioners rejecting the proof offered by the plaintiff is conclusive upon him. The most important question is the first one, for if Vaughan had the power to transfer his rights to the plaintiff, the decision of the commissioners, based upon a mistake of the plaintiff's *legal rights*, would not conclude the party affected by it, even if the secretary of the interior could clothe the commissioners with the power to decide upon the rights of settlers under the 17th article of the treaty. (*Johnson v. Towsly*, 13 Wall. 72.) This case has been repeatedly approved.

Langdon v. Joy.

If the language of the treaty be observed, it will be seen that it does not require that the improvements should have been made by the person residing on the land at the date of the signing or ratification of the treaty. But what is required is that they shall be owned by the actual occupant, and that such owner shall in person reside on such improvements at the date of the ratification of the treaty. At this date Vaughan was in possession and the owner of his improvements. His rights were then fixed. There is nothing in the treaty that makes it necessary that Vaughan should remain in possession and personally make the proof. If he had died, his heirs or devisees might, doubtless, have made the necessary proof, and become entitled to buy. So, also, the actual settler, whose rights were perfect at the ratification of the treaty, may sell and convey his rights to another. It is argued that the reference in the amendment to the treaty to persons entitled to pre-emption laws, incorporates all the restrictions of those laws into the treaty, including the provision which disables the pre-emptor from selling and conveying, or contracting to sell and convey, before he receives a patent.

But such was not the purpose of this provision of the treaty. If Vaughan had not possessed the qualifications of a pre-emptor, this might possibly have defeated his rights under the treaty; but if he did possess these qualifications at the date of the ratification of the treaty his rights were perfect, he could have bought as soon as the appraisement was made, and there is no public policy, as in the public pre-emption laws, against the alienation of his rights to others.

Under the allegations of the bill, our opinion is that the plaintiff was entitled to make the proof before the commissioners; that their action in rejecting his proof and denying his claim on the ground alleged was illegal, and that if the bill be true, the plaintiff is equitably entitled to the land, and that the defendant holds the legal title in trust for him.

MILLER, *Circuit Justice*, concurs.

DEMURRER OVERRULED.

NOTE.—Further construction of the 17th article of the treaty, see *Stroud v. Missouri River, Ft. Scott, and Gulf R. R. Co. post.*

Stroud v. Missouri River, etc., Railroad Company.

JAMES W. STROUD v. MISSOURI RIVER, FORT SCOTT, AND
GULF RAILROAD COMPANY.

1. In the treaty between the United States and the Cherokee Nation of Indians, concluded July 19th, 1866, ratified July 27th, 1866, and proclaimed August 11th, 1866 (14 Stats. at Large, 804), for the sale of a large tract of land known as the "Cherokee Neutral Lands," a preferable right was given to "actual settlers" to purchase, on certain terms, the land owned and personally occupied by them: *Held*, construing the treaty, as amended, that one who is an actual settler, within the meaning of the treaty, at the date of its ratification, and entitled to the benefit of its provisions, may, after that time, and before making proof under the regulations of the secretary of the interior, transfer his right to purchase the land to which he is entitled, and the grantee may make the required proof and purchase the land.
2. The land is not "mineral land" within the meaning of the treaty, because a coal deposit underlies it.
3. Whether the treaty, as finally amended, provides for *one* or *two* classes of settlers, discussed, but not decided.

(Before DILLON and FOSTER, JJ.)

Cherokee Neutral Lands.—Construction of Treaty with Cherokee Nation (14 Stats. at Large, 804), in Respect to Rights of Actual Settlers.—Right Transferable.—Mineral Lands.

THIS is a bill in equity, in which the plaintiff claims to be one of the persons protected by the 17th article of the treaty hereinafter referred to, and in which he seeks to compel the defendant (who holds the legal title to the one hundred and sixty acres of land in controversy), to convey the same to him. All questions as to form of pleadings, sufficiency of tender, etc., are waived.

The case was submitted to the court on the following agreed statement of facts:

1. That the real estate in controversy in this action, to-wit, the northeast quarter of section eighteen (18), township twenty-seven (27), range twenty-five (25), in Bourbon county, state of Kansas, is a part and parcel of a tract of about eight hundred thousand acres of land, known as the "Cherokee Neutral Lands."

Stroud v. Missouri River, etc., Railroad Company.

2. That said tract of land was ceded to the United States by the Cherokee Nation, or tribe of Indians, by treaty concluded July 19th, A. D. 1866, ratified July 27th, A. D. 1866, and proclaimed August 11th, A. D. 1866.

3. That previous to and on August 11th, A. D. 1866, one Peter Teel resided upon said northeast quarter ($\frac{1}{4}$) of section eighteen (18), township twenty-seven (27), range twenty-five (25), and on and before that date said Teel made improvements on said land of the value of over fifty dollars (\$50), to-wit, of the value of fifteen hundred dollars (\$1,500), and on said day owned and occupied said improvements for agricultural purposes, and that said land was not mineral land (except that there is a stratum of coal underlying a portion of said quarter section). That said improvements were on and covered each of the forty-acre tracts embraced in said quarter section in controversy in this suit.

4. That said Teel and said plaintiff had not enjoyed then, or previous thereto, the benefits of the pre-emption laws of the United States, and that said Teel was entitled to pre-emption under the pre-emption laws of the United States.

5. That a commission was duly and legally appointed to appraise said land according to the provisions of said treaty; and that said commission met, some time in the year 1866, and appraised said land at two dollars (\$2) per acre, in the aggregate at the sum of three hundred and twenty dollars (\$320); and said commissioners were authorized and directed by the secretary of the interior to hear and receive proof relative to the claim of settlers under the seventeenth (17th) article of said treaty and the amendments thereto.

6. That after the making and proclamation of said treaty, and before said commissioners met, the plaintiff, James W. Stroud, purchased all the right, title, and interest of said Teel in and to said land, and the improvements thereon, and paid him a valuable consideration therefor, and received from him a good and sufficient deed thereto; that plaintiff purchased the same for agricultural purposes; and that plaintiff, James W. Stroud, was in the actual possession and occupancy of the same when the said com-

Stroud v. Missouri River, etc., Railroad Company.

missioners met to appraise said land, and had not then or previous thereto enjoyed the benefits of the pre-emption laws of the United States, and said plaintiff was entitled to pre-emption under the pre-emption laws of the United States.

7. The plaintiff, under the rules and regulations prescribed by the secretary of the interior, went before said commissioners and *made proof* of the facts and each of them hereinbefore stated, for the purpose of procuring the privilege of purchasing said land under the provisions of said treaty; that this plaintiff *made proof* before said commissioners of the settlement of said Teel on said land prior to August 11th, A. D. 1866, and of the improvements thereon at said date, of the value of *over* fifty dollars (\$50), of plaintiff's purchase from said Teel, and that Teel had not then, or prior thereto, enjoyed the benefits of the pre-emption laws of the United States; and of plaintiff's actual occupation and possession of said land when said commission met to appraise said land; and that said land was not mineral land, except as hereinbefore stated; and that plaintiff had purchased the same for agricultural purposes.

8. That said commissioners and the secretary of the interior refused to allow this plaintiff to purchase said land, on the ground, as the plaintiff was by said commissioners informed, that the secretary of the interior had already decided that the right to purchase said lands, under the 17th article of said treaty and the amendments thereto, was *personal* to the *settler* who *occupied* said land at the date of the proclamation of said treaty, and that this plaintiff's purchase thereof was wholly void.

9. That plaintiff then and there offered to pay said sum of three hundred and twenty dollars (\$320), the appraised value of said land, to said commissioners, or to such person as said commissioners should designate; that said commissioners refused to accept said sum of three hundred and twenty dollars (\$320), or any sum at all.

10. That after the appraisal of said land, and after plaintiff had *made* his *proof* before said commissioners, as aforesaid, the secretary of the interior caused a patent for the land in contro-

Stroud v. Missouri River, etc., Railroad Company.

versy to issue from the United States to one James F. Joy; that afterwards said Joy sold and transferred the land in controversy to the said defendant, the Missouri River, Fort Scott, and Gulf Railroad Company. It is agreed that Joy procured the title from the United States, as agent for the defendant.

11. That said deed from said Teel to the plaintiff, James W. Stroud, for the land in controversy in this suit, was a quit-claim deed, duly and properly signed and delivered, but without acknowledgment; that said deed was never recorded by the register of deeds of the proper county; but that said plaintiff is now, and has been all the time since his purchase from said Teel, as aforesaid, in the open and notorious possession and occupancy of the land in controversy.

12. The defendant has paid taxes on said land since the date of the transfer from said Joy, to-wit, from the 1st day of March, 1871.

QUESTIONS FOR SPECIAL FINDINGS.

To the Honorable Judges of the Circuit Court of the United States for the District of Kansas:

Inasmuch as there are about two hundred persons residing upon said neutral lands, who claim under the provisions of the 17th article of said treaty and the amendments thereto, in all of which is involved the construction of some parts of said article, and many of which raise other questions under said article than those presented by the agreed facts in the foregoing case; and inasmuch as it is very desirable to have a rule of law established for the settlement of all these cases without prolonged and expensive litigation, the counsel for both parties hereto respectfully request your honorable court to construe and interpret the whole of said article and the amendments thereto; and in so doing to find upon the following questions, all of which are involved in some one or more of said cases:

1. Was the right to purchase given to *one* or *two* classes of persons by the 17th article of the treaty and its amendments?

Stroud v. Missouri River, etc., Railroad Company.

2. Who must have the qualification of a pre-emptor; the original settler, his vendee, or both?

3. Is the settler's (or his vendee's) right to purchase limited to the sub-divisions actually covered by his improvements, or do they extend to the whole quarter?

4. Can the original settler make sale prior to his proof before said commissioners, and is such sale valid?

5. In such case is a parol sale sufficient to pass the right to purchase to the vendee? and if not, can a parol sale be made good by a bill in chancery to which the original settler is made a party?

6. Is it necessary that the original settler, or his vendee, should make or offer to make proof of his settlement before said commissioners? and is a general offer to prove up, and a refusal to allow him to do so, sufficient to secure his right?

7. Does the fact of the land having coal on or underlying it make it mineral land within the meaning of the treaty? and does such fact destroy the settler's right to purchase? and what is the rule when the land is partly underlaid with coal, and all valuable for agricultural purposes?

8. To whom is the appraised value of the land to be paid? and is the settler required to pay interest?

9. Is the settler required to refund the taxes paid by the patentee, and legal interest thereon?

10. To whom does the patentee look for the repayment of the original purchase money for said land, and interest thereon?

The undersigned would also venture to request that the findings and rulings of the court upon the questions above suggested be made in writing and filed — to the end that they may serve as rules of law in the settlement of other causes not in court.

Complainant claims title to the land in controversy under the 17th article of the treaty, and the amendments thereto, made by and between the United States and the Cherokee Nation or tribe of Indians, July 19th, 1866, and proclaimed August 11th, 1866; and the supplemental article to said treaty, proclaimed June 10th, 1868.

Stroud v. Missouri River, etc., Railroad Company.

The 17th article of said treaty is as follows :

"ARTICLE XVII. The Cherokee Nation hereby cedes, in trust to the United States, the tract of land in the state of Kansas which was sold to the Cherokees by the United States, under the provisions of the 2d article of the treaty of 1835 ; and also that strip of land ceded to the Nation by the 4th article of said treaty which is included in the state of Kansas ; and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said state.

"The lands herein ceded shall be surveyed as the public lands of the United States are surveyed, under the direction of the commissioner of the general land office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee national council, and one by the secretary of the interior, and, in case of disagreement, by a third person, to be mutually selected by the aforesaid appraisers. The appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements.

"And the secretary of the interior shall from time to time, as such surveys and appraisements are approved by him, after due advertisement for sealed bids, sell such lands to the highest bidders, for cash, in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value : *Provided*, that whenever there are improvements of the value of fifty dollars (\$50) made on the lands not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such person so owning and in person residing on such improvements, shall, after due proof, under such regulations as the secretary of the interior may prescribe, be entitled to buy, at the appraised value, the smallest quantity of land in legal sub-divisions which will include his improvements, not exceeding in the aggregate one hundred and sixty acres ; the expenses of survey and appraisement to be paid by the secretary out of the proceeds of sale of said lands : *Provided*, that nothing in this article shall prevent the secretary of the interior from selling the whole of said neutral lands in a body

Stroud v. Missouri River, etc., Railroad Company.

to any responsible party, for cash, for a sum not less than eight hundred thousand dollars."

The amendment affecting said article is as follows:

" * * * * 2d. Strike out the last proviso in article 17, and insert in lieu thereof the following:

"*Provided*, that nothing in this article shall prevent the secretary of the interior from selling the whole of said lands, not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre." (U. S. Stats. vol. 14, pages 804-807.)

The supplemental article before referred to, or so much thereof as affects the rights of settlers, is as follows:

"It is further agreed and distinctly understood that, under the conveyance of the 'Cherokee Neutral Lands' to the said American Emigrant Company, 'with all beneficial interests therein,' as set forth in said contract, the said company and their assigns shall take only the residue of such lands after securing to '*actual settlers*' the lands to which they are entitled under the provisions of the 17th article and amendments thereto of the said Cherokee treaty of August 11th, 1866; and that the proceeds of the sales of said lands, so occupied at the date of said treaty by '*actual settlers*,' shall enure to the sole benefit of, and be retained by the secretary of the interior as trustee for, the said Cherokee Nation of Indians."

Hill & Sallee, for the plaintiff.

Wallace Pratt, and *Blair & Ferry*, for the defendant.

DILLON, *Circuit Judge*.—The plaintiff claims to be one of the class of persons protected by the 17th article of the treaty, and files his bill in equity to enforce that right, insisting that the defendant holds the legal title to the one hundred and sixty acres of land in controversy in trust for him.

Stroud v. Missouri River, etc., Railroad Company.

Under the agreed facts, the court is of opinion that the plaintiff is entitled, on the payment to the defendant of the appraised price of two dollars per acre, without interest, and the amount of taxes on the said land paid by the defendant, with interest thereon at the legal rate of seven per cent per annum, to a decree that the defendant convey the land in question to him. The rights and equities of the government and the defendant company, as to the amount received by the defendant over the amount which was paid to the government for the land, viz., one dollar per acre, can be adjusted between them, and does not concern the plaintiff.

It is implied in the above conclusion, that we are of opinion that one who is an "actual settler," within the meaning of the treaty, at the date of its ratification, and entitled to its protective provisions, may, after that time and before making proof under the regulations of the secretary of the interior, transfer his right to purchase the land to which he is entitled, and that the grantee may make the required proof, and thus entitle himself to make the purchase at the appraised value. If the land had not been patented by the government, the grantee, after making the due proof of his grantor's right at the date of the ratification of the treaty, would be entitled to make the purchase, if not in his own name, then in the name of his grantor, who would hold it for the benefit of the grantee.

The 17th article of the treaty does not in terms require the settler to be in possession at the time of his purchase; but he must be in actual occupancy at the date of the ratification of the treaty in order to be within its provisions. If thus in possession his right would descend to his heirs, and, in our judgment, it may be devised or conveyed if it was complete when the treaty was ratified.

The intention of the senate throughout to protect the "actual settler" is unmistakable, and accords with the uniform practice of the government in this respect. It was the rights of those who owned and personally occupied their improvements that the treaty sought to guard and secure. The actual settler must own

Stroud v. Missouri River, etc., Railroad Company.

the improvements in his own right and not for another, and he must personally occupy the improvements, or the land on which they are situate, for agricultural purposes, and he must thus own and occupy them at the date of the ratification of the treaty. If he was such an owner and occupier, the treaty intended to give him the preferable right to purchase. His rights were fixed; and no one is benefitted by holding that he may not transfer his right when it is thus consummate. To hold otherwise would be to imprison the settler for the time without any advantage to the government, or any rightful advantage to any one else.

What we decide is, that if the right of the actual owner and occupier at the date of the ratification of the treaty to buy the land is complete, he may, after that, transfer to another his right in any mode which is effectual as between them, and the grantee succeeds to the grantor's rights in this respect. This court so held in *Langdon v. Joy, ante*, in which holding Mr. Justice MILLER concurred.

The land in question was used by the settler for agricultural purposes, and is not "mineral land" by reason of a coal deposit underlying a portion of it. Lead and zinc, and perhaps other mineral deposits, were known to exist not far from, if not within, these "neutral lands," and it was lands containing such deposits that was meant by the word "mineral" as used in the treaty. In sales of the public lands in Iowa, Missouri, and Kansas, lands containing coal deposits have not been reserved by the government as "mineral" lands.

In this case the improvements were on and covered each of the forty-acre tracts constituting the quarter-section of land in controversy. It is clear, therefore, that the plaintiff's rights extend to each of the forty-acre tracts included in the one hundred and sixty acres claimed by the plaintiff.

What is said above, expressly or by implication, substantially answers all the questions submitted, except the question whether the treaty, as finally amended and ratified, provides for *one* or *two* classes of "actual settlers." This question is not necessarily

Stroud v. Missouri River, etc., Railroad Company.

involved in the present case, and as its solution is not unattended with difficulties, we do not now pronounce any definite opinion upon it. In the regulations of the secretary of the interior on this subject, he construed the 17th article of the treaty as providing for two classes of settlers, viz.:

1. Those who owned and personally occupied improvements for agricultural purposes, of the value of fifty dollars, at the date of the *signing* of the treaty, July 19, 1866.

2. Those who, after the *signing* (July 19, 1866), and before the *ratification* of the treaty (August 11, 1866), were actual settlers upon the land, having the qualifications of pre-emptors under the pre-emption laws of the United States.

The provisions of the first and second provisos, in respect of actual settlers, being *in pari materia*, must be taken and construed together; and thus regarded, the leading purpose of the second amended proviso seems to have been to secure the rights of those settlers mentioned in the first proviso by prohibiting a sale, by the secretary of the interior, *en masse*, which would cut them off—thus *limiting*, and not *enlarging*, the power previously given to this officer, and extending this protection to the settler from the date of the *signing* of the treaty, July 19th, to the date of its *ratification*, August 11th; and the words in the second proviso, “to each person entitled to pre-emption under the pre-emption laws of the United States,” if not intended merely as words of limitation on the power of the secretary to sell, mean probably no more than that the settler must have the qualifications of a pre-emptor as to citizenship of the United States, and be the head of a family, or a widow, or a single man over the age of twenty-one years, not owning three hundred and twenty acres of land elsewhere, etc., to be entitled to the benefit of the treaty. But the provisions of the pre-emption laws, as to extent and character of improvements, so far as they conflict with the express provisions of the first proviso of the 17th article of the treaty, in this regard, would be controlled by the provisions of the treaty.

We doubt whether the treaty, as amended, provides for two

Stroud v. Missouri River, etc., Railroad Company.

distinct classes, making separate provisions of a different character as to each class, as the secretary of the interior seems to have supposed. But we are not prepared to express any final opinion on the subject, and leave it open. On the payment of the purchase money and taxes, as above stated, into court for the defendant, the plaintiff may have a decree for the lands.

FOSTER, J., concurs.

DECREE ACCORDINGLY.

NOTE.—Further construction of the 17th article of the treaty, see *Langdon v. Joy, ante*.

REPORTS OF CASES DETERMINED
IN THE
Circuit Court of the United States,
FOR THE
DISTRICT OF MINNESOTA.

UNITED STATES v. JOHN BAYER *et al.*

1. Under the statute (Rev. Stats. secs. 5440, 5132), other persons than the bankrupt can *conspire* with the latter to commit the acts made criminal by the 7th and 10th sub-divisions of section 5132 of the Revised Statutes.
2. It *seems* that under the criminal section of the bankrupt act (Rev. Stats. sec. 5132), one who procures and abets the person against whom the proceedings in bankruptcy are pending, to commit the acts therein made criminal, may be indicted, though not expressly referred to in the statute.

(Before DILLON, Circuit Judge.)

*Conspiracy to Commit Acts made Penal by the Bankrupt Act.—
Revised Statutes, Sections 5132, 5440, Construed.*

THE defendants are indicted for a conspiracy to commit offences against the United States in violation of the penal section of the bankrupt act (Rev. Stats. secs. 5132, 5440). The indictment contains two counts. The first count, based upon section 5132, sub-division 10, and section 5440, after alleging the adjudication of bankruptcy of one John Bayer by the district court for the district of Minnesota, June 2d, 1875, and

United States v. Bayer.

after setting forth the facts, showing the jurisdiction of that court in said matter of bankruptcy, proceeds to charge that the said John Bayer, and the defendants Kargleder and Ober, within three months next before the bankruptcy proceedings aforesaid were commenced, to-wit, on June 1st, 1874, in said district, amongst themselves, unlawfully and fraudulently conspired, confederated, and agreed together to commit a certain offence against the United States, to-wit: by the execution and delivery, then and there, by said John Bayer, of a certain instrument in writing, signed by him, wrongfully and unlawfully, and with intent to defraud the creditors of said John Bayer, to mortgage, sell, and dispose of (while they still remained unpaid for, as in the indictment alleged), to said John Kargleder, otherwise than by *bona fide* transactions in the ordinary way of the trade of said Bayer, certain goods and chattels of said Bayer which had been obtained on credit, etc. It is then alleged that said Bayer and said Kargleder thereupon performed certain specified acts in order to effect the object of said conspiracy.

The second count, based upon section 5132, sub-division 7, and upon section 5440, after repeating the preliminary averments of the first count, further alleges the appointment of an assignee in bankruptcy of said Bayer's estate, and the proof in bankruptcy by said Kargleder of a false and fictitious debt against said Bayer's estate, and the said Bayer's and Ober's knowledge of the premises; and further charges that the said Bayer, Kargleder, and Ober did *then* unlawfully conspire and confederate together to commit an offence against the United States, to-wit: did conspire and confederate together, that Bayer, knowing as aforesaid that Kargleder had proved a false and fictitious debt against his estate, should then and there, and continually for more than one month thereafter, fraudulently and unlawfully wholly fail, refuse, and neglect to disclose the same to his said assignee in bankruptcy. It is then averred that, in order to effect the object of said conspiracy, said Kargleder and Ober then and there falsely asserted and claimed, in the presence of said assignee, that said debt, so proven by said Kargleder, was a true, just, and valid

United States v. Bayer.

claim against Bayer for money loaned to him by Kargleder, and that in further pursuance of the conspiracy, the bankrupt Bayer then and for two weeks thereafter fraudulently failed, neglected, and refused to disclose said fictitious debt to his said assignee in bankruptcy.

The defendants, Kargleder and Ober, move to quash the indictment, because no person, except a person respecting whom proceedings in bankruptcy are commenced, can commit the offence; because the defendants cannot conspire to commit an offence which they cannot, in law, commit, and because a *nolle prosequi* has been entered as to Bayer, the bankrupt.

Morris Lamprey and *Reuben E. Benton*, for the motion.

W. W. Billson, district attorney, opposed.

DILLON, *Circuit Judge*. — The questions presented are important, and, so far as the court is advised, are new. The leading objection made by the counsel for the defendants, is that no person can be punished under the penal section of the bankrupt act (Rev. Stats. sec. 5132), except *the* "person respecting whom proceedings in bankruptcy are commenced;" that this section does not extend to those who counsel, aid, and assist in the commission of the acts which that section makes criminal, when committed by *the* person respecting whom bankruptcy proceedings are pending, and, as a corollary, it is urged that if a person cannot himself commit a specified offence, he is necessarily incapable of conspiring with another or others to commit it.

This indictment is for *conspiracy*, and is based upon section 5440 of the Revised Statutes, which provides that "if two or more persons conspire to commit any offence against the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc. The offence which it is alleged the defendants conspired to commit is made penal by the *seventh* and *tenth* sub-divisions of section 5132 of the Revised Statutes.

United States v. Bayer.

It is not necessary to decide the main proposition relied on by the learned counsel for the defendants, which is that under section 5132 *no person*, except the one respecting whom proceedings in bankruptcy are commenced, can commit, or be punished for, the acts therein made criminal. Without intending to determine the soundness of this position, I must say that the result of the argument left my mind with a decided impression against it. It is true that the statute only mentions the debtor or bankrupt; but it is a statutory misdemeanor only that is created, and the general principle of the law is that all procurers and abettors of statutory offences are punishable under the statute, although not expressly referred to in the statute. (Bishop on Statutory Crimes, 136; *Commonwealth v. Gannet*, 1 Allen, 7; *United States v. Harbison*, 13 Int. Rev. Record, 118 [Judge EMMONS], and cases cited *infra*.) Moreover, it has been several times adjudged, upon full consideration, that it is immaterial that the aider and procurer is himself disqualified to be the principal actor in the offence by reason of not being of a particular age, sex, condition, or class. (*State v. Sprague*, 4 Rh. Is. 257; *Bogrus v. State*, 34 Georgia, 275; *Rex v. Potts*, Russ. & Ry. Crown Cases, 352; 1 Bishop on Crim. Law, 627, 629.)

But if it be true that none but the bankrupt can be indicted under section 5132, still it is clear that other persons can combine and confederate with him to commit the acts therein made offences against the United States. By section 5440, conspiracies to commit any offence against the United States are made punishable, provided some act is done to effect the object of the conspiracy. The statute is based upon the common law principle that *conspiring* to commit a crime is of itself criminal, but adds the requirement of an overt act, and the fact that one of the conspirators could not himself commit the intended offence, neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it.

The legal as well as moral guilt of all the conspirators is the same. One of the offences which it is alleged the conspiracy was entered into to commit, was that the defendants, knowing that

Ex parte Van Hoven.

a false and fictitious debt against the estate of the bankrupt had been proved, conspired together that the bankrupt should fail to disclose the same to the assignee; the other was in respect to a fraudulent disposition of the property of the person in bankruptcy to one of the alleged conspirators. Now, it is necessary to both of these offences that another person besides the bankrupt should have been guilty of a violation of law, and if the bankrupt and such other person conspire together to commit the acts made criminal by the bankrupt law, and either does any act in pursuance of such conspiracy to effect its object, why should they not be punishable, although the relation of the parties to the criminal act is such that only one of them can commit the act itself? (Bishop on Crim. Law, sec. 432.)

The conspiracy and the consummated act are different offences, in the sense, at least, that the fact that the offence has been completed is no *legal* bar to a prosecution for the conspiracy. (*United States v. Boyden*, 1 Lowell, 266, 269, and cases cited; *Regina v. Boulton*, 12 Cox Crown Cases, part 3, p. 87; *Regina v. Rowland*, 5 *Ib.* 485, 487; *United States v. Rindskopf*, 21 Int. Rev. Record, 326, 327.)

The motion to quash the indictment is denied.

MOTION OVERRULED.

Ex parte HENRY VAN HOVEN.

1. The sixth article of the treaty of May 1st, 1874, between the United States and Belgium, expressly provides for requisition on the part of the government applying, and consent of the government applied to. It is not necessary that the warrant on such requisition be issued by the president. It is sufficient if it issue from the state department, under its official seal. In foreign relations, and executive acts imposed by treaty stipulations, the president acts through that department.

Ex parte Van Hoven.

2. Where the complaint charges the crime of forgery as having been committed on a certain day in the jurisdiction of the foreign government, in that one "wilfully, etc., uttered and put in circulation forged or counterfeit papers, or obligations, or other titles, or instruments of credits," without specifying the kind of obligations forged, or the character of the papers, or nature of titles, etc., it is defective at common law, does not fairly inform accused of the charge, and does not show probable cause for arrest.

(Before NELSON, J.)

*Jurisdiction in Matter of Extradition.—Treaty with Belgium.—
Complaint.—Warrant.*

THE case is fully stated in the opinion of the court.

C. K. Davis, for the petitioner.

John Y. Page, *contra*.

NELSON, J.—The counsel for the petitioner, upon the argument of the demurrer, has presented, and urged with great ability, objections to the proceedings instituted by the Belgian government to obtain the extradition, which may be reduced to two in number:

1. That the commissioner had no jurisdiction, under the treaty stipulations between the two countries, to issue any warrant for the arrest and examination of persons charged with the commission of forgery, with a view to their extradition.

2. That the complaint upon which the warrant was issued by the commissioner does not make out a case or contain such a statement of the offence as would justify a warrant of arrest.

I shall take up the first objection, and, with a view of stripping the case of some questions that were presented on the argument, state that, in my opinion, the judicial arm of the government is powerless to arrest any alleged fugitive from justice whose extradition is demanded by a foreign government under any treaty with the United States, without a requisition having been previously made by the foreign government upon the United States, and its authority obtained to apprehend such fugitive.

Ex parte Van Hoven.

The sixth article of the treaty proclaimed May 1, 1874, between the United States and Belgium, provides expressly for such requisition and consent to the arrest on the part of the government applied to.

Has such requisition been made and consent been obtained? The mandate or warrant issued by the department of state recites the fact that such requisition was made by the proper officers of the Belgian government in pursuance of the treaty, and this mandate is the only evidence that the president of the United States initiated the proceedings or authorized the apprehension of the prisoner.

The objection that such warrant is not issued by the president of the United States, because it emanates from the state department, and is signed by the secretary of state and under his official seal, in my opinion is not tenable. The history of the government shows that, in all our foreign relations, the president, in performing executive acts imposed by treaty stipulations or otherwise, acts through the department of state, and under its official seal. And when, as in this case, a warrant or mandate is signed by the secretary of state, it is the act of the president through the proper executive department, of the government. Thus, upon the face of the papers, which are admitted by the demurrer to be true, the requisition has been properly made by the Belgian government, and a proper warrant has been issued by the president of the United States to authorize the commissioners to act. I have no authority to go behind the warrant which has been issued by the president through the state department, and it must be taken as a fact that the president discharged his executive functions in accordance with the terms of the sixth article of the treaty.

The act of congress in relation to "extradition" (title 66, Rev. Stats. U. S. p. 1026), authorizes certain judicial officers, "whenever a treaty for extradition exists between the government of the United States and any foreign government, upon complaint being made, under oath, charging any person found within the limits of any state, district, or territory, who, having committed

Ex parte Van Hoven.

within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, to issue his warrant for the apprehension of the person so charged, that he may be brought before such commissioner, to the end that the evidence of criminality may be heard and considered." And in case such commissioner deems the evidence sufficient to sustain the charge made, he certifies the same, together with all the testimony, to the secretary of state, that a warrant may issue for his surrender.

This act of congress applies to all treaties made before or after its passage, and was necessary, in order to give the judicial department of the government jurisdiction to investigate the charge of crime alleged to have been committed within the limits of a foreign government.

The commissioner of the circuit court of the United States for the southern district of New York, in obedience to the warrant of the president, and upon complaint made by the consul-general of Belgium, resident in the city of New York, has issued his warrant of arrest for the purpose of investigating the charges made against the prisoner, and he had authority so to do, provided the complaint by the consul-general made out a proper case.

And this brings me to a consideration of the next and last objection. The complaint charges that Van Hoven committed, within the jurisdiction of the kingdom of Belgium, the crime of forgery, as it is specifically mentioned in the treaty of 1874, to-wit: "With having, within the jurisdiction of the kingdom of Belgium, and in violation of the laws thereof, and for his own benefit, and on or about the 21st day of December, 1875, wilfully and knowingly and maliciously uttered and put in circulation forged papers, or counterfeit papers, or counterfeit obligations, or other titles, or instruments of credits." This is the charge in *hæc verba*, without specifying the kind of obligations forged, or the character of the papers, or the nature of the titles, or instruments of credits forged.

Is such a complaint sufficiently definite for the purpose of jurisdiction? It is not necessary that a complaint should be

Ex parte Van Hoven.

drawn with the formal precision of an indictment, but the accused should be fairly informed of the charge made, so that he may be able to meet the investigation.

In the case of "*Heinrich*" (5 Blatchford, 8, 414), the court says: "The complaint upon which the warrant of arrest is asked, should set forth clearly, but briefly, the substance of the offence charged, and the substantial, material features thereof." I think, tested by the above decision, the complaint does not show probable cause for the arrest, and, at common law, is defective. The consul does not pretend to be familiar with the particulars of the alleged crime, and he has no personal knowledge of any of the facts, and states that he makes the complaint by virtue of his office, and for the purpose of giving effect to the treaty. Clearly, under our system of criminal jurisprudence, such a complaint would not authorize the arrest of one of our citizens, and it cannot have been the intention of the treaty-making power, or the congress of the United States, to have permitted the arrest of an alleged fugitive upon a complaint which would be defective in the former case.

The petitioner, therefore, must be discharged from custody.

ORDERED ACCORDINGLY.

NOTE.—The foregoing decision of NELSON, J., was given in April, 1876. An appeal was taken from the order of discharge, and that order was affirmed by the circuit court, at the June term, 1876. The petitioner, after the order for his discharge was made, was again arrested, and sued out another writ of *habeas corpus*. (See next case.)

Ex parte HENRY VAN HOVEN. (Second case.)

1. Under the extradition treaty of the United States with Belgium (treaties 1873-74, p. 120), it is no ground of discharge of the alleged fugitive, on *habeas corpus*, that the warrant of arrest was issued by the proper judicial officer instead of by the president.
2. It need not appear by distinct recital in the mandate of the secretary of state to the judicial officers of the government, that a war-

Ex parte Van Hoven.

rant for the arrest of the alleged fugitive, for the crime imputed to him, ever issued in Belgium. The judicial department will presume from the mandate of the secretary of state that this was done.

3. A complaint, under oath, made by the consul-general of Belgium, before a proper commissioner in the southern district of New York, upon the strength of telegrams and depositions taken in Belgium, held sufficient to justify the court in remanding the prisoner for examination by the commissioner before whom the complaint was made and who issued the warrant of arrest.

(Before DILLON and NELSON, JJ.)

Extradition.—Treaty with Belgium.—Warrant of Arrest.—Mandate of the Secretary of State.—Sufficiency of Complaint.

HENRY VAN HOVEN presented a petition to this court June 22, 1876, setting forth that he is restrained of his liberty and imprisoned by David H. Crowley in the city of St. Paul, and district of Minnesota; that he is informed and believes that he is imprisoned under the color of the authority of the United States, by virtue of certain proceedings initiated for the extradition of the petitioner under a certain treaty entered into between the United States of America and the kingdom of Belgium, on the 19th day of March, 1874; that he is thus restrained of his liberty in violation of the constitution of the United States, and of said treaty. The petitioner prays for a writ of *habeas corpus* for the reason that no warrant has been issued for his arrest and detention, and that he is not charged with any crime mentioned in the treaty, and that no legal proceedings whatever have been had for his extradition, and that his arrest and detention are in violation of law.

A writ of *habeas corpus* was allowed, returnable forthwith. At the hearing, David H. Crowley, in obedience to the writ of *habeas corpus*, appeared in court with Henry Van Hoven in charge, and made a return, setting forth that he was a deputy marshal of the United States for the southern district of New York, and that he held the petitioner by virtue of a warrant issued by Kenneth G. White, a commissioner of the circuit court of the United States for the southern district of New York,

Ex parte Van Hoven.

specially appointed to execute the provisions of title 66 of the Revised Statutes for giving effect to certain treaty stipulations, commanding all marshals of the United States for any district, and their deputies, and each of them, to bodily apprehend, arrest, and imprison the said Van Hoven, which warrant was delivered April 7th, 1876, to the marshal of the southern district of New York, and April 16th the respondent was directed and authorized by said marshal to execute said warrant.

This warrant, in substance, states that Charles Mali, consul for the kingdom of Belgium, has made complaint and application before Kenneth G. White, commissioner as aforesaid, in the city of New York, in the southern district of New York, for the arrest of Henry Van Hoven, charged with the crime of forgery, to-wit: "With having, within the jurisdiction of the kingdom of Belgium, in violation of the laws thereof, and for his own benefit, and on or about the 21st day of December, 1875, wilfully and knowingly and maliciously uttered and put in circulation, and offered for discount, and caused to be discounted by the firm of Nagelmacker & Sons, doing business as bankers in the city of Liege, and received the proceeds of two certain bills of exchange, drawn and endorsed by the said Van Hoven, for the amount of eight thousand francs, and purporting to have the acceptance of a certain A. Lefevre, doing business as merchant at Brussels, at Rue Veuve, the said acceptance being a forgery, and known to be such by the said Van Hoven." The warrant recites also a similar discount of a bill of exchange for nine thousand five hundred francs, by the banking house of Messrs. Victor Terwangue & Co., in the city of Liege, in Belgium, purporting to have upon it the acceptance of a certain Vois Comprier, at Maestricht, the said acceptance being a forgery.

The respondent further makes return of the *complaint* of Charles Mali, the consul-general of Belgium at the city of New York, annexed to the warrant of the commissioner, with certain depositions of witnesses taken before a judge in the kingdom of Belgium, and also a mandate issued under the hand of the secretary of state of the United States and the seal of the department of state.

Ex parte Van Hoven.

The *mandate* of the secretary of state is in the following words:

"Department of state, to any justice of the supreme court of the United States, any judge of the circuit or district court of the United States in any district, any judge of a court of record of general jurisdiction in any state or territory of the United States, or to any commissioner specially appointed to execute the provisions of title 66 of the Revised Statutes of the United States, for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivery up of certain offenders: Whereas, pursuant to the provisions of the convention between the United States of America and Belgium, of the 19th March, 1874, for the mutual delivery of criminals, fugitives from justice, in certain cases, Mr. Maurice Delfosse, accredited to this government as envoy extraordinary and minister plenipotentiary of Belgium, has made application to the proper authorities thereof for the arrest of one Van Hoven, charged with the crime of forgery, and alleged to be a fugitive from the justice of Belgium, and who is believed to be within the jurisdiction of the United States; and, whereas, it appears proper that the said Van Hoven should be apprehended and the case examined in the mode provided by the laws of the United States aforesaid: Now, therefore, to the end that the above named officers, or any of them, may cause the necessary proceedings to be had in pursuance of said laws, in order that the evidence of the criminality of the said Van Hoven may be heard and considered, and, if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the secretary of state, that a warrant may issue for his surrender pursuant to said convention, I certify the facts above recited. In testimony whereof, I have hereunto signed my name and caused the seal of the department of state to be affixed. Done at the city of Washington, this 8th day of March, A. D. 1876, and of the independence of the United States the one hundredth.

"(Signed.)

HAMILTON FISH,
"Secretary of State."

Ex parte Van Hoven.

The *complaint* of Charles Mali, the consul-general of Belgium at the city of New York, upon which the commissioner issued his warrant for the arrest of Van Hoven, is in the following words:

"Circuit court of the United States for the southern district of New York, in the matter of the application of the Belgian government for the extradition of Henry Van Hoven — before Kenneth G. White, United States commissioner :

"Southern District of New York, ss :

"Charles Mali, being duly sworn, deposes and complains as follows :

"That he is the consul-general of the kingdom of Belgium at this city of New York, and that he acts herein as such consul as aforesaid.

"That the above named Henry Van Hoven is charged with the commission, within the territories and jurisdiction of the said kingdom of Belgium, of the crime of forgery, as it is specifically mentioned and provided for in a convention between the United States of America and the kingdom of Belgium for the surrender of criminals, proclaimed on May 1st, 1874, after the same was concluded at Washington, on the 19th of March, 1874, and after the ratifications were exchanged, on the 31st of March, 1874, and April 30th, 1874, in consequence of its being advised by the senate on the 27th of March, 1874.

"That the above named Henry Van Hoven is a fugitive from the justice of Belgium, and that he is to be found within the territories, limits, and jurisdiction of the United States.

"That, in pursuance of the aforesaid convention between the United States and the kingdom of Belgium, Maurice Delfosse, envoy extraordinary and minister plenipotentiary of the kingdom of Belgium, accredited to this government, has made due requisition on the president of the United States for the surrender of the said Henry Van Hoven, and upon such requisition the secretary of state has issued a mandate, dated the 8th day of March, 1876, certifying to the propriety that the said Henry

Ex parte Van Hoven.

Van Hoven should be apprehended, and his case examined in the mode provided by the acts of congress, as is more fully shown in the said mandate, which is hereto annexed and made a part of this complaint, and to which deponent prays to refer. Wherefore the said consul, by virtue of his office as aforesaid, and for the purpose of giving effect to the said convention, now charges, on information and belief, the said Henry Van Hoven with the commission of the crime of forgery, to-wit: with having, within the jurisdiction of the kingdom of Belgium, and in violation of the laws thereof, and for his own benefit, and on or about the 21st day of December, 1875, wilfully and knowingly and maliciously uttered and put in circulation, and offered for discount to, and caused to be discounted by, the firm of Nagelmacker & Sons, doing business as bankers in the city of Liege, and received the proceeds of two certain bills of exchange drawn and endorsed by the said Van Hoven, for the amount of eight thousand francs, and purporting to bear the acceptance of a certain A. Lefevre, doing business as merchant at Brussels, Belgium, at Rue Veuve, the said acceptance being a forgery, and known to be such by the said Van Hoven; and for having, on or about the same date of the 21st day of December, 1875, wilfully, knowingly, and maliciously uttered and put in circulation, and offered for discount to, and caused to be discounted by, the firm of Victor Terwangue & Co., doing business as bankers in the city of Liege, Belgium, and recovered the proceeds of another certain bill of exchange drawn and endorsed by the said Van Hoven, for the amount of nine thousand five hundred francs, and purporting to bear the acceptance of a certain Vois Comprier, at Maestricht, the said acceptance being a forgery, and known to be such by the said Van Hoven.

“That the information of said complainant, Charles Mali, is derived from telegrams from the proper authorities of the kingdom of Belgium, as well as from certain depositions of Gustave Tripnells, Victor Terwangue, and Augustin Dubois, properly taken before Adolph Nilson, one of the justices of the district of Liege, Belgium, and duly certified by John Wilson, consul of

Ex parte Van Hoven.

the United States of America at Brussels, kingdom of Belgium, to be legally and properly authenticated, so as to be entitled to be received in evidence in support of the criminal charges mentioned therein, and for the purpose of extradition proceedings, as is provided in section 5271 of title 66 of the Revised Statutes of the United States. And the said consul, therefore, entering this complaint, made under oath, charging the said Henry Van Hoven with the crime of forgery, as enumerated in article 11 of said convention for the extradition of said criminals between the kingdom of Belgium and the government of the United States, makes application to Kenneth G. White, a commissioner appointed by the circuit court of the United States of America for the southern district of New York, in the second circuit, that his warrant be issued for the apprehension of said Henry Van Hoven, so charged, that he may be brought before the said commissioner, to the end that the evidence of his criminality may be heard and considered, and that on such hearing a certificate be made by the said commissioner as to the evidence thereof being deemed by him sufficient to sustain the charge under the provisions of the aforementioned convention, and for the purpose of the surrender of the said Henry Van Hoven, according to the stipulations of said convention.

"(Signed.)

CHARLES MALI,
"Consul of Belgium."

"Sworn to before me, this 7th day of April, 1876. Commissioner duly appointed by the circuit court of the United States for the southern district of New York, and specially appointed to execute the provisions of title 66 of the Revised Statutes of the United States, for giving effect to certain treaty stipulations."

The first article of the said treaty with Belgium (treaties 1873-74, page 120), is as follows:

"The government of the United States and the government of Belgium mutually agree to deliver up persons who, having been convicted of or charged with any of the crimes specified in the following article, committed within the jurisdiction of one

Ex parte Van Hoven.

of the contracting parties, shall seek an asylum or be found within the territories of the other: *Provided*, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime had been there committed."

Among the crimes enumerated in the second article is the crime of forgery and the uttering of forged papers.

The sixth article of the treaty is as follows:

"Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties; or, in the event of the absence of these from the country, or its seat of government, they may be made by superior consular officers.

"If the person whose extradition may be asked for shall have been convicted of a crime, a copy of the sentence of the court in which he may have been convicted, authenticated under its seal, and an attestation of the official character of the judge by the proper executive authority, and of the latter by the minister or consul of the United States or of Belgium respectively, shall accompany the requisition. When, however, the fugitive shall have been merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, and of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid. The president of the United States, or the proper executive authority of Belgium, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to the law and the evidence, the extradition is due pursuant to the treaty, the fugitive may be given up, according to the forms prescribed in such cases."

The prisoner, on the said return, moves to be discharged from the custody of the said Crowley.

Ex parte Van Hoven.

C. K. Davis, for the petitioner.

John Y. Page, for Crowley.

DILLON, *Circuit Judge*.—Requisition for the surrender of the petitioner to the Belgium government is recited, in the mandate of the secretary of state, to have been duly made upon the executive authority of this government. Complaint before a duly authorized commissioner was made by the consul-general of Belgium in New York, and a warrant for the apprehension of the petitioner issued, on which he has been arrested and is now in custody, for the purpose of being taken before the commissioner who issued the warrant, for an examination of the charge against him, made in the complaint.

It is urged that the petitioner is entitled to be discharged on several grounds:

1. That, under the treaty (article 6), the president of the United States is required to issue a warrant for the apprehension of the fugitive, that he may be brought before the proper judicial authority for examination. The object of this provision is that the legal proceedings for the surrender of a fugitive may have the sanction of the executive department. (*Ex parte Kaine*, 1 Blatchf. 1.) This is given in this case by the mandate of the secretary of state. (*In re Farez*, 7 Blatchf. 34.) Under our system of the separation of the powers of the government into departments, the warrant of arrest issues from the judicial department, and the substance, spirit, and purpose of the treaty have been complied with in this regard.

2. It is urged that the petitioner is entitled to be discharged because it does not affirmatively appear in the mandate of the secretary of state, or in the complaint, that any warrant for the arrest of the petitioner in Belgium, for the crime imputed, ever issued in that country. Under the treaty it may be true that no surrender of the petitioner to the Belgian government can legally be demanded, unless proceedings in that country have been instituted, and a warrant of arrest there issued. Such warrant, and

Ex parte Van Hoven.

the depositions upon which the warrant issued, must accompany the requisition upon this government for the surrender. Such is the treaty. The judicial department will presume, from the mandate of the secretary of state, that this was done. It may be that if it is shown on the hearing, or at any subsequent stage of the proceedings, that no warrant for the arrest of the petitioner in Belgium ever issued in that country, and no depositions, such as are required by the treaty, were ever made in Belgium, the judicial department of this country, on its power being invoked, would prevent the extradition. (*Ex parte Kaine, supra.*)

3. It is next urged that the complaint is insufficient, because filed by the consul-general, who does not profess to have any personal knowledge of the matters charged against the petitioner, but whose information is derived from telegrams from the Belgian authorities, and certain depositions taken in Belgium, not before us. (*In re Farez*, 7 Blatchf. 345, S. C. *Id.* 491.) Unlike the first complaint in this case, the present complaint is specific in the charges made against the defendant. This court cannot hear the case on the merits. It belongs to the commissioner who issued the warrant to decide whether, according to the law and the evidence, the extradition is due pursuant to the treaty. Under the decisions and practice in the second circuit, the order of the commissioner may, it would seem, be revised and corrected by the federal courts therein, at the instance of the petitioner. (*In re Heinrich*, 5 Blatchf. 414.)

Motion to discharge the petitioner denied.

NELSON, J., concurs.

ORDERED ACCORDINGLY.

NOTE.—The order of NELSON, J., in this case when before him (*ante*, p. 415), was affirmed on appeal; and a petition was presented for another writ of *habeas corpus*, to the circuit court, at the June term, 1878, in the proceeding upon which the foregoing opinion of the circuit judge was pronounced.

Subsequently, the petitioner filed in the circuit court a plea to the effect that, in fact, no criminal proceedings whatever had ever been

 Lantz v. Randall.

instituted in Belgium against him, and that no warrant ever issued, and no depositions had ever been taken in that country. This plea was traversed by the officer having the petitioner in custody, and on a hearing subsequently had before NELSON, J., the warrant of arrest in Belgium, and certain depositions there taken, were produced, whereupon the petitioner was remanded to the custody of the deputy marshal, to be taken for examination before the commissioner who issued the warrant of arrest.

In the Albany Law Journal, vol. 18, p. 45, July 20, 1878, the reader will find a carefully prepared and valuable article, from the pen of Judge SPEAR, on the subject of "Extradition from the United States." The learned writer states the leading statutable provisions, and collects the principal decisions in this country respecting the executive and also the auxiliary judicial functions involved in the delivery, by the United States, of a fugitive criminal to a foreign government, under treaty stipulations. He concludes his paper in these words: "The law, by thus distributing the legal functions to be performed between the executive and judicial departments of the government, secures to the party accused the highest certainty that he will be surrendered to a foreign government only when all the necessary conditions are present. The judiciary cannot surrender him; and the president cannot do it until the judiciary decides that the case is a proper one for delivery, and even then the president may revise and reject that decision. This furnishes ample protection against any abuse of the extradition power, especially when we add that the writ of *habeas corpus*, as a means of testing the legality of the proceedings, is always available to the party, if sought before his actual surrender and removal from the country."

 LANTZ v. RANDALL *et al.*

1. A state cannot make a subject of a foreign government a citizen of the United States. This can only be done in the mode provided by the naturalization laws of congress.
2. Citizenship and the right to vote are neither identical nor inseparable; and the constitution of Minnesota, although it authorizes resident unnaturalized foreigners to vote at state elections and hold office, does not make them citizens of the state, and such persons may remove causes to the circuit court of the United States on the ground that they are aliens, although they have resided in the state for many years and voted at elections, as authorized by the state constitution, or held office under the laws of the state.

Lanz v. Randall.

(Before MILLER, Circuit Justice.)

Naturalization.— Aliens.— Removal of Cause.— Act of March 3, 1875.

ON motion by the defendant to remand the cause to the state court. It was removed to this court by the plaintiff, on the ground that he was an alien, being a subject of the grand duke of Mecklenburg. The defendants are citizens of Minnesota. The removal was under the act of March 3d, 1875.

With respect to the citizenship of the plaintiff, it was admitted that he was originally a native born citizen of the grand duchy of Mecklenburg; that he emigrated to this country many years since; that shortly after his arrival he declared his intention to become a citizen of the United States, in conformity with the laws of the United States upon that subject matter; that for some fifteen years past he has resided in the state of Minnesota; and that on several occasions during his residence in the state he has voted at state elections, as authorized by the state constitution. The plaintiff was never finally admitted to citizenship under the naturalization laws of the United States.

Section 2, article III., of the constitution of the United States, provides that the judicial power of the United States shall extend to "*controversies * * * between a state, or the citizens thereof, and foreign states, citizens or subjects.*"

Section 2 of the act of congress of 1875, to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, provides that any suit of a civil nature, in which there shall be "*a controversy between citizens of a state and foreign states, citizens or subjects,*" shall be removable into the circuit court of the United States by either party.

The following are the provisions of the constitution of the state of Minnesota relating to the "elective franchise," referred to by counsel as bearing upon the question as to the jurisdiction of the federal court over the cause:

Lanz v. Randall.

"ARTICLE VII. — ELECTIVE FRANCHISE.

"SECTION 1. Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the United States one year, and in this state for four months next preceding any election, shall be entitled to vote at such election, in the election district of which he shall at the time have been for ten days a resident, for all officers that now are, or hereafter may be, elective by the people:

"1. White citizens of the United States.

"2. *White persons of foreign birth* who shall have declared their intention to become citizens, conformably to the laws of the United States upon the subject of naturalization.

"3. Persons of mixed white and Indian blood, who have adopted the customs and habits of civilization.

"4. Persons of Indian blood residing in this state, who have adopted the language, customs, and habits of civilization, after an examination before any district court of the state, in such manner as may be provided by law, and shall have been pronounced by said court capable of enjoying the rights of citizenship within the state.

"SEC. 2. No person not belonging to one of the classes specified in the preceding section, no person who has been convicted of treason or any felony, unless restored to civil rights, and no person under guardianship or who may be *non compos mentis* or insane, shall be entitled or permitted to vote at any election in this state.

"SEC. 3. For the purpose of voting, no person shall be deemed to have lost a residence by reason of his absence while employed in the service of the United States, nor while engaged upon the waters of this state or of the United States, nor while a student of any seminary of learning, nor while kept at any alms-house or asylum, nor while confined in any public prison.

* * * * *

"SEC. 7. Every person who, by the provisions of this article, shall be entitled to vote at any election, *shall be eligible to any*

Lanz v. Randall.

office which now is, or hereafter shall be, elective by the people in the district wherein he shall have resided thirty days previous to such election, except as otherwise provided in this constitution, or in the constitution and laws of the United States."

The practical importance of the question here involved arises from the fact that in Minnesota, and several of the western states where there are similar constitutional provisions, a large proportion of the foreign born residents are in the same situation as the plaintiff—that is to say, voters without having become naturalized under the laws of congress.

Bigelow, Flandrau, and Clark, for the motion. They cited as in point, *in re Wehlitz*, 16 Wis. 443, and relied on the state constitution, article 7.

W. P. Clough, contra. He cited 2 Kent Com. 43, 49; Story on Const. sec. 1693; *The Dred Scott Case*, 19 How. 405, 417, 422, 533, 582; *Baird v. Byrne*, 3 Wall. Jr. 1; Status of Subjects of the Duke of Mecklenburg, 15 Stats. at Large, 615, 616. Further, as to jurisdiction of federal courts over suits by or against aliens: *Hinckley v. Byrne*, 1 Deady, 224; *Breedlove v. Nicolet*, 7 Pet. 413; *Bonaparte v. Railroad Company*, Bald. 205; *Mossman v. Higginson*, 4 Dallas, 12; *Jackson v. Twentymen*, 2 Pet. 136; *Rateau v. Barnard*, 3 Blatchf. 245; *Wilson v. City Bank*, 3 Sumner, 422; *Piquet v. Swan*, 5 Mason, 35.

MILLER, *Circuit Justice*.—This case having been removed from the state court into the federal court on the ground that the plaintiff is an alien, a motion is made to remand it to the state court for want of jurisdiction.

The plaintiff was born a subject of the grand duke of Mecklenburg, and came to the state of Minnesota about fifteen years ago, where he has ever since resided. Shortly after his arrival in the state he made his declaration of intention with a view to naturalization, but has never applied for or obtained the final certificate of naturalization. He has several times voted at elections held in the state, and the constitution of the state authorizes

Lanz v. Randall.

him to do so without naturalization. He is also capable of holding office by the state constitution. The question, then, to be considered, is whether such a person in the state of Minnesota is to be considered as a citizen or subject of Mecklenburg within the meaning of the constitution (art. 3, sec. 2).

The plaintiff is undoubtedly a subject of the grand duke of Mecklenburg, having been born such, unless something has been done since his coming to this country to change that relation. It will hardly be contended that length of residence, even with intention never to return, can have that effect. Nor can the incomplete movement towards naturalization under the laws of the United States. The moving counsel, then, must rely on the constitution of the state of Minnesota, and the action of plaintiff under it, to change his citizenship.

I am of opinion that no state can make the subject of a foreign prince a citizen of the state in any other mode than that provided by the naturalization laws of congress; that when the constitution (art. 1, sec. 8), says that congress shall have power "to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States," it designed these rules, when established, to be the *only rules* by which a citizen or subject of a foreign government could become a citizen or subject of one of the states of this Union, and thereby owe allegiance to such state, and to the United States, and cease to owe it to his former government.

But I do not place the decision of the present case on that ground. The state of Minnesota has not attempted to make the plaintiff a citizen of that state, nor do the provisions of her constitution, when applied to the condition of the plaintiff, have that effect. The error has arisen from the same confusion of ideas which induced the advocates of female suffrage to assert, in the supreme court, the right of women to vote. That assertion is based upon the proposition that citizenship and the right to vote are inseparable; therefore, females, who are citizens, must be allowed to vote. This was unanimously overruled by this court. The present case is based upon the same idea, that citi-

Lanz v. Randall.

zenship and the right to vote are inseparable, and as the constitution of Minnesota gives plaintiff the right to vote, therefore he is a citizen of the state. But the proposition on which both arguments are based is wholly unsound.

There is no necessary or uniform relation between citizenship and the right to vote. In point of fact, by the constitution of Minnesota, and probably of every other state, only about one in five of its citizens is permitted to vote. All children born in the state and residing there are citizens, but until they come to the age of twenty-one years, they cannot vote. They have, however, all the rights that belong to citizenship, because they are citizens. So of all females, of all ages, who constitute half the citizens of any state. On the other hand, some states, and many municipalities, allow persons to vote who have no claim to be citizens, simply because they are residents and possess the other qualifications, and at one time, I believe, persons were permitted to vote in one state on account of property held there, though citizens of a different state. Of this, however, I do not feel sure, though there was no reason, in the nature of things or in the federal constitution, why it should not be so.

These observations show that citizenship is not a sole criterion of the right to vote, and still more clearly that the right to vote may exist without citizenship. This latter is precisely the case in Minnesota. That state, by a wise policy, has invited an industrious and useful population from abroad to occupy her vacant territory, and, as an inducement, has said, "You need not wait till you are naturalized and become citizens to exercise the elective franchise, and to become eligible to office."

That process requires five years. When they have taken the first step towards becoming citizens, by making the legal official declaration to that effect, they are allowed to vote if they possess the other qualifications of age, sex, and residence; but citizenship is not one of them. In doing this, the framers of the constitution had no intention of making a citizen of the foreigner. This was wholly unnecessary to the right to vote, and five-sixths of the persons who are citizens have not that right.

Minnesota Oil Co. v. Collier Lead Co.

I am of opinion, then, that nothing in the constitution of Minnesota, or in the acts of plaintiff under it, have made, or were intended to make, him a citizen of that state, even if it be within the constitutional power of the state to do so; and that, being a subject of a foreign state, he could rightfully remove his case from a state court to a federal court. The motion to remand should, therefore, be overruled.

MOTION OVERRULED.

THE MINNESOTA LINSEED OIL COMPANY v. THE COLLIER
WHITE LEAD COMPANY.

1. In "contracts by telegraph" the same rule as to acceptance prevail as in contracts by mail; the contract is completed when an acceptance of the proposition is deposited for transmission in the telegraph office.
2. In case of a proposition by telegraph for the sale of certain goods, the market for which was subject to sudden and great fluctuations, an immediate answer should be returned, and an acceptance of such proposition telegraphed after a delay of twenty-four hours from the time of its receipt was not an acceptance within a reasonable time, and did not operate to complete the contract.

(Before NELSON, J.)

Contracts by Telegraph.—Acceptance.—When Complete.

THIS action was removed from the state court and a trial by jury waived.

The plaintiff seeks to recover the sum of \$2,151.50, with interest from September 20, 1875—a balance claimed to be due for oil sold to the defendant.

The defendant, in its answer, alleges that on August 3d, 1875, a contract was entered into between the parties, whereby the plaintiff agreed to sell and deliver to the defendant, at the city of St. Louis, during the said month of August, twelve thousand

Minnesota Oil Co. v. Collier Lead Co.

four hundred and fifty (12,450) gallons of linseed oil for the price of fifty-eight (58) cents per gallon, and that the plaintiff has neglected and refused to deliver the oil according to the contract; that the market value of oil after August 3d and during the month was not less than seventy (70) cents per gallon, and therefore claims a set-off or counter-claim to plaintiff's cause of action. The reply of the plaintiff denies that any contract was entered into between it and defendant.

The plaintiff resided at Minneapolis, Minnesota, and the defendant was the resident agent of the plaintiff, at St. Louis, Missouri. The contract is alleged to have been made by telegraph.

The plaintiff sent the following dispatch to the defendant:

"MINNEAPOLIS, July 29, 1875.

"To Alex. Easton, Secretary Collier White Lead Company, St. Louis, Missouri:

"Account of sales not enclosed in yours of 27th. Please wire us best offer for round lot named by you—one hundred barrels shipped.

"MINNESOTA LINSEED OIL COMPANY."

The following answer was received:

"ST. LOUIS, MO., July 30, 1875.

"To the Minnesota Linseed Oil Company:

"Three hundred barrels fifty-five cents here, thirty days, no commission, August delivery. Answer.

"COLLIER COMPANY."

The following reply was returned:

"MINNEAPOLIS, July 31, 1875.

"Will accept fifty-eight cents (58c), on terms named in your telegram.

"MINNESOTA LINSEED OIL COMPANY."

Minnesota Oil Co. v. Collier Lead Co.

This dispatch was transmitted Saturday, July 31, 1875, at 9:15 P. M., and was not delivered to the defendant in St. Louis, until Monday morning, August 2, between eight and nine o'clock.

On Tuesday, August 3, at 8:53 A. M., the following dispatch was deposited for transmission in the telegraph office:

"ST. LOUIS, MO., August 3, 1875:

"*To Minnesota Linseed Oil Company, Minneapolis:*

"Offer accepted—ship three hundred barrels as soon as possible."

"COLLIER COMPANY."

The following telegrams passed between the parties after the last one was deposited in the office at St. Louis:

"MINNEAPOLIS, August 3, 1875.

"*To Collier Company, St. Louis:*

"We must withdraw our offer wired July 31st.

"MINNESOTA LINSEED OIL COMPANY."

Answered:

"ST. LOUIS, August 3, 1875.

"*Minnesota Linseed Oil Company:*

"Sale effected before your request to withdraw was received. When will you ship?

"COLLIER COMPANY."

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon.

It is urged by the defendant that the dispatch of Tuesday, August 3d, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil.

Minnesota Oil Co. v. Collier Lead Co.

The plaintiff, on the contrary, claims, 1st, that the dispatch accepting the proposition made July 31st, was not received until after the offer had been withdrawn; 2d, that the acceptance of the offer was not in due time; that the delay was unreasonable, and therefore no contract was completed.

Young & Newel, for the plaintiff.

Geo. L. & Chas. E. Otis, for the defendant.

NELSON, J.—It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission. (See [Am. Law Reg. vol. 14, No. 7, 401, "Contracts by Telegraph," article by Judge REDFIELD, and authorities cited; also,] *Trevor v. Wood*, 36 N. Y. 307.)

The reason for this rule is well stated in *Adams v. Lindsell* (1 Barn. & Ald. 681). The negotiation in that case was by post. The court said "that if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that so it might go on *ad infinitum*." (See, also, 5 Pa. St. 339; 11 N. Y. 441; *Mactier v. Frith*, 6 Wend. 103; 48 N. H. 14; 8 English Common Bench, 225.) In the case at bar the delivery of the message at the telegraph office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8:53 of the clock, on Tuesday morning, August 3d, and the subsequent dispatches are out of the case. (1 Parsons on Contracts, 482, 483.)

This rule is not strenuously dissented from on the argument,

Minnesota Oil Co. v. Collier Lead Co.

and it is substantially admitted that the acceptance of an offer by letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established, if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (vol. 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. * * * If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men

Owens v. Gotzian.

they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied.

JUDGMENT ACCORDINGLY.

JAMES A. OWENS, Assignee of Murphy & Rowe, bankrupts, v.
CONRAD GOTZIAN and CHANNING SEABURY, partners, etc.

1. The judgment of the state court will be considered by the federal courts sitting within the territorial limits of the state in which the same is rendered, as a domestic judgment.
2. The service of summons by a party to the action is an irregularity that is cured by entry of judgment, and will not avail when the judgment is attacked in a collateral proceeding.
3. "Party to the action," as used in section 47, chapter 66, p. 456, Revised Statutes of Minnesota, extends, it seems, only to parties to the record.

(Before NELSON, J.)

Judgment of State Court.—Validity as Depending on Mode of Service.

THIS action was brought to recover damages for the conversion by the defendants to their own use of certain personal property alleged to belong to the bankrupts' estate. During the trial the record of a judgment rendered in a district court of the state of Minnesota, in an action in which the present defend-

Owens v. Gotzian.

ants were plaintiffs, and the bankrupts were defendants, was introduced in evidence, and proof was made that the defendants purchased the property in question at a sheriff's sale, under execution issued upon such judgment. The plaintiff offered to prove that the service of summons in that suit was made by a silent partner of the firm of Gotzian & Seabury, and urged that such service was invalid, and the judgment void, by virtue of the following statute of the state of Minnesota:

"The summons may be served by the sheriff of the county where the defendant is found, or by any other person not a party to the action." (Rev. Stats. Minn. sec. 47, p. 456.)

The testimony offered was objected to by the defendants.

The facts sufficiently appear in the opinion of the court.

Davis, O'Brien, & Wilson, for plaintiff.

Geo. L. Otis and Rogers & Rogers, for defendants.

NELSON, J.—Two propositions are involved in the objection:

1. Is the judgment of the state court a foreign or domestic judgment?
2. If a domestic judgment, can the plaintiff attack it in this suit?

In nearly every instance where the judgment of a federal court sitting within the same territorial limits has been the subject of consideration in a state court, it has been regarded as a domestic judgment. (*Thompson v. Lee County*, 22 Iowa, 380, and cases cited.) For obvious reasons the judgment of a state court would be regarded as domestic by the federal courts in the same state; both federal and state courts enforce and give effect to the same laws; summon jurors from, and their judgments operate upon and compel seizure and sale of the property of, the same citizens, and are not, therefore, foreign to each other.

Being a domestic judgment, it may be shown void upon its face if the court rendering it had no jurisdiction of the defendant's person, and it is equally true that, except for errors affecting the jurisdiction of the court, its validity cannot be ques-

Owens v. Gotzian.

tioned. If jurisdiction of the person was obtained in this case in the state court, this court must regard it as conclusive of the question determined, and give it full force and effect. The record discloses personal service upon the defendants, yet the plaintiff urges that the service was made by one of the parties to the action, and that such service is not permitted, and renders the judgment a nullity as to strangers to the action. This proposition is not without force. If the statute prescribes the mode and manner of the service of summons, and authorizes it to be made by any person except a party to the action, the question may well be asked why a judgment entered up without any appearance of the defendants thus served is not beyond the authority of the court rendering it? Why should strangers to the judgment be prevented from establishing, perhaps a prior lien, or a superior incumbrance, on showing that the service of summons was by an incompetent person? The answer is, that this error in the service did not affect the jurisdiction of the court, and is only an irregularity. The actual service upon the defendants appears in the record, and no objection being made before judgment is rendered, the defect is cured by the entry. Such is undoubtedly the rule as between parties to the suit, and it is reasonable that strangers to the record should not impeach it in a collateral action. The service shows a defect in obtaining jurisdiction, not a want of jurisdiction, and it is presumed the court, when judgment was rendered, determined the service attempted sufficient, and passed upon that question. (*Thompson v. Lee County*, 22 Iowa, 380.) Again, an inspection of the record shows that the person who served the summons, although perhaps a silent partner of plaintiffs, was not by name a party to the suit. There has been no authoritative construction of this statute, but I think the term "not a party to the action" extends only to parties named in the proceedings, and not to a party in interest, whose name does not appear. The objection, at least, should have been made before judgment was rendered.

OBJECTION OVERRULED.

The Albany.

THE ALBANY.

1. A material-man has no lien for repairs or supplies to a domestic vessel.
2. Whether a vessel is foreign or domestic, depends upon the residence of her owners, and not upon her enrollment, where the two are different.
3. The "Albany" was owned at the town of Boscobel, in Wisconsin, and was enrolled at Galena, in Illinois, the nearest collector's office to the residence of the owner; necessary supplies were furnished by the libellant to the vessel at La Crosse, in Wisconsin: *Held*, that the libellant was not entitled to a maritime lien on the vessel.

(Before DILLON, Circuit Judge.)

Maritime Liens. — Home-Port. — Residence of Owner. — Place of Enrollment.

APPEAL IN ADMIRALTY. A libel *in rem* was filed in the United States district court for Minnesota, in August, 1875, to enforce a maritime lien for necessary material and supplies furnished by the libellant to the Albany, at the request of the master. These were so furnished by libellant in 1873, at La Crosse, in the state of Wisconsin, where the libellant resided and did business. The owner of the Albany was then, and still is, one Jacob Heime, who resided at Boscobel, in the state of Wisconsin. Boscobel is within the collection district which has its collector's office at Galena, Illinois, where the said Albany was enrolled and licensed, and Galena is the nearest collector's office to Boscobel. The Albany was engaged in navigating the Mississippi river, and during the winters she regularly laid up at Boscobel. She has painted on her stern, as required by the act of congress, the words, "The Albany, Boscobel, Wisconsin."

In 1875, the Albany was mortgaged to certain of the claimants, whose mortgages were duly registered just before the seizure of the boat. The mortgagees had no notice of the libellant's claim.

The Albany has been at the port of La Crosse as often as once

The Albany.

a month during each season of navigation, since the libellant furnished said materials and supplies.

There were two main questions argued in the district court :

1. Has the libellant a maritime lien? 2. If so, is the same stale as respects the mortgagees?

The district court entered a decree in favor of the libellant. The owner and mortgagees appeal.

J. H. Davidson, for libellant (appellee).

W. P. Warner, for claimants (appellants).

DILLON, *Circuit Judge*. — The decisive question in this case is, what was the home-port, or state, of the steamboat "Albany?" It is a question of very great importance, and in respect of which some conflict of judicial opinion appears to exist. It has been deliberately considered, and without spreading upon this opinion all the learning applicable to it, I proceed to state my views concerning it. As strengthening the conclusion arrived at, and illustrating the reasons upon which it is based, it is desirable, briefly, to advert to the general law upon the subject of maritime liens or hypothecations.

By the civil law, the material-man, for repairs made or necessary supplies furnished to a vessel, had an implied or tacit lien, whether the vessel was in her home-port or in a foreign port. (Abbott on Shipping, 142; *The Lottawanna*, 21 Wall. 590; 2 Cent. Law Jour. 410.) And such is the undoubted rule in the maritime nations of Europe, which have adopted the civil law as the basis of their jurisprudence. It is equally well known that this principle has not been adopted as the law of England, or, rather, after having obtained in the admiralty courts of that country for some time, it was overturned by the hostility of the common law courts. (*The Zodiac*, 1 Hag. Adm. 325.)

In the present case, the supplies were furnished to the vessel at the instance of the master, and in the maritime law of Europe certain limitations upon his power, as between him and the owner,

The Albany.

in respect of contracts for supplies or money to obtain them, are declared to exist.

By the celebrated marine ordinance of Louis XIV., whose provisions have been largely embodied in the *Code de Commerce*, material-men furnishing supplies are entitled to a lien; but this right is subject to the qualification (art. 232, *Code de Commerce*) that the *master* shall not, in the place of residence (*dans le lieu de la demeure*) of the owners or their agent, without special authority, cause repairs to be made, buy sails, cordage, etc., or take up money for that purpose. But if the master violate this duty, the material-man, acting in good faith, is not deprived of his right or remedies. The words, "the place where the owner resides," are construed in France to comprehend the whole district, but not the whole country. (*Selden v. Hendrickson* [The Richmond], 1 Brockenb. 396, 399.) But in England there is no implied lien recognized for repairs made or supplies furnished in that country—the principle of the civil law in this respect having been, as above observed, overthrown by the early hostility of the common law courts to the admiralty jurisdiction. But for necessary repairs made and supplies furnished abroad or in a foreign port, the English courts recognize and enforce a maritime lien.

It is important to notice the reasons given in the English courts for this distinction. Lord MANSFIELD says: "Work done for a ship in England, is supposed to be on the personal credit of the employer"—the owner or master. "In foreign ports," he adds, "the master may hypothecate the ship." (*Wilkins v. Carmichael*, Doug. 101.) And, finally, the house of lords, in 1789, to conform the law of Scotland to the law of England, in *Wood v. Hamilton*, decided that persons who had repaired and furnished a ship in Scotland, the place of the owner's residence, had no lien or privilege upon the ship itself. (Abbott on Shipping, ch. 3, part 2, p. 147.)

A maritime lien for supplies and necessary repairs abroad, furnished at the instance of the master, the owner being absent, is allowed from necessity and the encouragement of trade. (Abbott on Shipping, 144, 145.)

The Albany.

The question in England, as to what is the place of residence of the owner, has given rise to controversy; but Lord TENTERDEN says: "I apprehend the whole of England is considered, for this purpose, as the residence of an Englishman; at least before the commencement of the voyage." (Abbott on Shipping, 155; *Selden v. Hendrickson*, 1 Brockenb. 402, where the subject is discussed by Chief Justice MARSHALL.) But the question is now settled in Great Britain by statutable provision. By 19 and 20 Victoria, chapter 97, section 8, all ports within Great Britain and Ireland, the Channel Islands, and the islands adjacent, if part of the queen's dominions, are to be deemed home-ports in relation to the rights and remedies of persons having claims for repairs done or supplies furnished to ships.

Such being the state of the law in Europe and England, it became a question in the admiralty courts in this country, soon after their creation under the constitution, what doctrines they would adopt in respect of repairs and supplies. Some followed the more enlarged right given by the continental or general maritime law; others the more restricted right recognized by the English courts. In this condition of the law, at home and abroad, the supreme court of the United States, in 1819, decided the case of *The General Smith*, 4 Wheat. 438. In that case a Baltimore merchant furnished supplies to the ship *General Smith*, which was owned at Baltimore, and the court decided that there was no lien upon the vessel. In delivering its judgment, Mr. Justice STORY thus states the doctrine of the court: "Where repairs have been made or necessities have been furnished to a foreign ship, or to a ship in the port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security. But in respect to repairs and necessities in the port or state to which the ship belongs, the case is governed by the municipal law of that state, and no lien is implied, unless it is recognized by that law." The case of *The General Smith* has been frequently approved by the supreme court, and in the recent case of *The Lottawanna*, 21 Wall. 558, it has been solemnly reaffirmed, with but two dissent-

The Albany.

ing judges. In applying the rule of *The General Smith* in other cases, the following language, bearing upon the question in the case under consideration, has been used: "Material-men who furnish materials or supplies for a vessel * * in a port other than a port of the state where the vessel belongs, have a maritime lien on the vessel" therefor. (*The Belfast*, 7 Wall. 643, per CLIFFORD, J.) But not "for materials and supplies furnished to a vessel in her home-port." (*Ib.* 645.) "A maritime lien does not arise for repairs made and supplies furnished in the home-port of the vessel." This "question was put at rest" by *The General Smith*, 4 Wheat. 443. (Per CLIFFORD, J., in *The Kalorama*, 10 Wall. 211; *Ferry Company v. Beers*, 20 How. 393, 402.)

We are thus brought to the question in the present case, whether the Albany, within the doctrine of the supreme court, belonged to the state of Wisconsin, where her owner resided, and to which she purported to belong by the words painted upon her stern, or belonged to the state of Illinois, in which she was enrolled. Or, in other words, which is the home-port? 1. Is it the particular town or city in a state in which the owner resides, and is every other port in the state, as well as elsewhere, foreign? 2. Is the vessel at a home-port at all ports in the state in which her owner actually resides, although she may be enrolled in another state? Or, 3. Does the state in which the enrollment is made conclusively determine the home-port or domestic character of the vessel, irrespective of the residence of the owner?

To solve these questions, let us first seek the aid of adjudged cases. In *The Brig Nestor*, 1 Sumner, 73, A. D. 1831, on which a lien for supplies furnished in the District of Columbia for the Nestor, belonging to the port of Portland, Maine, was sustained, Mr. Justice STORY said: "The admiralty has a clear jurisdiction to maintain such suits whenever the supplies have been furnished to the vessel in a foreign port; and every port is foreign to her which is not in the same state to which she belongs. So the doctrine was laid down in the case of *The General Smith*, and it has never, to my knowledge, been in the slightest degree departed from." "Ports of states, other than

The Albany.

those of the state where the vessel belongs," says CLIFFORD, J., "are considered as foreign ports." (*The Lulu*, 10 Wall. 200; *Ib.* 212.) "The term 'foreign port' in the jurisprudence of the United States," says the same learned judge, in a case on the circuit, "includes all maritime ports other than those of the state where the vessel belongs." (*Burke v. The Brig Richmond*, 1 Clifford, 308, 314.) And see the same illustration put by the same judge in the case of *The Lottawanna*, 21 Wall. at p. 594.

The language of the opinion in the case of *The General Smith* and of Mr. Justice STORY and Mr. Justice CLIFFORD, above referred to, fairly implies, I think, that the domestic or foreign character of the vessel is determined by the state in which the owner resides, and not by the state in which the enrollment is made. And decided cases (*The General Smith*, *The Nestor*, *The Chusan*, 2 Story, 456), in the statement of them, show that the residence of the owner was regarded, and not the enrollment.

In the case of *The Golden Gate*, 5 Am. Law Reg. (O. S.) 142, 1 Newbury, 308, decided by an able admiralty judge, the precise question was presented, whether the foreign or domestic character of a vessel depended on the residence of her owner, or on the port of her enrollment. Judge WELLS decided that where these were different, the residence of the owners governed as respects the rights and remedies of material-men. And the same reason is given by him as the one which is supposed to underlie the rule in this country denying a maritime lien for supplies to a domestic vessel. Judge WELLS says: "If the owners reside in a foreign country, or in another state, the material-man is presumed to give credit to the boat and also to the owners — because he is not presumed to rely alone on the owners who live so remote and who are beyond the jurisdiction of the courts of his state. If the owners reside in the same state with the material-man, the latter can easily resort to them for payment and readily enforce it in the courts; therefore he may well be supposed to give credit to the owners alone. It is apparent, therefore, that the *place of enrollment* has nothing to do with the *credit* that is given; and has, therefore, nothing to do with the question of lien."

The Albany.

A similar principle was approved and applied by Judge LEAVITT, in the case of *The Superior*, 3 Am. Law Rep. (O. S.) 622, 1 Newbury, 178. He holds that the place of enrollment is only *prima facie* evidence of the port or state to which the vessel belongs, and denies the soundness of *The Indiana*, Crabbe, 479, so far as it decided that the vessel necessarily belonged to the port where she is enrolled.

The exact question whether the home-port of a vessel is determined by the residence of the owner or the place of enrollment, arose in *The Mary Bell*, 1 Sawyer, 135, and it was decided by Judge DEADY that the state in which the owner resided, and not that in which the enrollment was made, governed. Judge BETTS made a similar decision in the southern district of New York. (*The Kosciusko*, 11 N. Y. Legal Obs. 38.) And in *The Alida*, this learned judge says: "Where services or supplies are rendered to a foreign ship, a lien attaches by the general maritime law, and the different *states* of the federal Union are, in regard to this question, regarded as foreign states to each other." (1 Abbott Adm. Rep. 168.) This conclusion accords with the views of Chief Justice MARSHALL, in *Selden v. Hendrickson*, 1 Brockenb. 396, 403, 1819, where, after stating the law of England, he says: "The same principle applied to the United States, requires, I think, that a port in one state should not be considered as the place of residence of owners who live in another state." * * "If every port, except that in which the owner actually resides, be not for this purpose [the hypothecation of the vessel] a foreign port, I perceive no rule more proper in this country, no rule better adapted to our situation, and to the reason of the thing, than to say that the power of the master to hypothecate *exists in every port out of the state in which the owner resides*, where he has no agent."

I am aware that in *The Loper*, Taney's Decisions, 500, A. D. 1851, Mr. Chief Justice TANEY is reported as laying down a contrary doctrine, and as saying: "The circumstance that the owner or charterer [of the *Loper*] was a citizen of another state, would not make her a foreign vessel in the port of Baltimore ;

The Albany.

the port at which she was enrolled and licensed was her home-port. As she belonged to Baltimore, and the supplies were furnished here, they were furnished at her home-port, and created no lien upon the vessel. This question was directly decided in the case of *The General Smith*." And this is all of the opinion of the chief justice on this point. He enters into no reasoning, and although great weight is due to every expression of this eminent judge, I think it manifest, from the opinion itself, that his attention was not called to the considerations affecting the question, and that he acted upon the supposition that the case was controlled by *The General Smith*, and decided it by simply citing and following the judgment of the supreme court.

A still different view has been taken as to what constitutes the home-port of an American steamboat engaged in inland navigation, by Judge DEADY, in the case of *The Favorite*, 7 Ch. Legal News, 395, which was enrolled in Oregon, and whose owner resided at the place of enrollment. The learned judge, after remarking that, "under the ruling of *The Lottawanna* by the supreme court, what constitutes the home-port is yet an open question," says: "I think, upon reason and convenience, the home-port ought to be the one where the vessel is enrolled. Away from that place, whether in or out of the state where her owner resides, she is supposed to be *in itinere*, and therefore relying upon her credit for the purchase of supplies to continue the voyage." And he held that material-men residing in Oregon were entitled to a maritime lien, if they resided at a town or port in the state different from the one where the owner resided and the boat was enrolled. I do not think the judge intended to overrule his decision in the case of *The Mary Bell*, *supra*, and however convenient the doctrine he held would be, and however desirable it might be deemed as limiting the doctrine of *The General Smith*, denying a lien upon domestic vessels, I have not been able to persuade myself that it is consistent on this point with the judgments of the supreme court.

All of the adjudications in respect to the rights and remedies of material-men, since the case of *The General Smith*, have pro-

The Albany.

ceeded, I think, upon the notion that vessels owned in the *state* where the credit was given are to be considered as domestic vessels, and there is in such cases no maritime lien; if owned without the state there is a maritime lien, and I shall decide this case upon the assumption that this view is the one we are required to take by the decisions of the supreme court.

I have not discussed the question upon principle. It were profitless to do so. I content myself with the observation that it would doubtless have been better, in view of our local situation, if the supreme court had adopted the rule of the general maritime law, recognizing a lien for proper repairs made and supplies furnished on the credit of the vessel, without respect to the states in which the creditor and owner of the vessel reside. The doctrine of the supreme court, which it is safe to say would never have been adopted if the court could have had the benefit of the reflected light of subsequent experience, when applied to vessels navigating on lakes and inland waters, traversing several states, has produced, and if it remains will continue to produce, confusion, inconvenience, hardship, and injustice between creditors equally meritorious. But the supreme court, in *The Lottawanna*, in the face of an unanswerable dissent, stands by, rather than vindicates, the doctrine of *The General Smith*, discriminating between the rights and remedies of domestic and foreign material-men. The inferior courts must accept its exposition of the law as authoritative until that tribunal changes its judgment, or congress shall, as in my judgment it ought, make that provision for domestic creditors which is so ineffectually provided by the boat laws of the different states.

My understanding of the decisions of the supreme court as to the rights and remedies of material-men, lead me in this case to these conclusions:

1. That the Albany "belonged" to the state of Wisconsin, and that every port in that state was, as respects material-men, the home-port of the vessel. The libellant, residing in and extending credit in that state, is, under the view of the supreme court, conclusively presumed to have extended it to the owner,

Middlings Purifier Company v. Christian.

who resided in the state, or to the master, and has no implied or maritime lien on the vessel.

2. That as respects the rights and remedies of material-men, the home-port or state of a vessel is the state wherein the owner resides, and not the state or district in which she is enrolled, where the two are different. To hold in such a case that the *enrollment* controlled, would destroy the only foundation upon which a distinction between the rights of domestic and foreign material-men has been made, viz.: that the former are presumed to extend credit to the owner, whom they are supposed to know, or whom, at all events, they may pursue in the courts of their own state. (*The St. Lawrence*, 1 Black, 527; *The Lottawanna*, 21 Wall. p. 593.)

The decree of the district court is reversed, and a decree will be here entered dismissing the libel at the costs of the libellant.

DECREE ACCORDINGLY.

AMERICAN MIDLINGS PURIFIER COMPANY v. JOHN A.
CHRISTIAN *et al.*

1. Application for an injunction, *pendente lite*, to restrain the defendants from an alleged infringement of the plaintiff's patent for the "new process" of manufacturing flour from middlings: the validity of this patent having been sustained by the supreme court (*Cochrane et al. v. Deener*, October term, 1876), and that judgment not being shown to have been collusive, and the infringement being made probable, the court ordered an injunction unless the defendants would give a bond conditioned for the payment of any final decree for money in favor of the plaintiff, and for keeping an accurate account of the amount of flour made by them, and to report the same every three months to the court.
2. The principles which guide the courts in granting or refusing such injunctions, considered by MILLER, circuit justice.
3. A decree or judgment of a circuit court, after full hearing or trial in an adversary cause, sustaining a patent, is very strong evidence of its

Middlings Purifier Company v. Christian.

validity in an application for an injunction; and such a decree or judgment of the supreme court is of still greater weight, if not absolutely conclusive.

4. Previous user of the patent by the plaintiff, or those who claim under him, is not absolutely essential to the right to an injunction: if the validity of the patent has been established by a decree or judgment of the circuit or supreme court, the plaintiff, if otherwise entitled, may have an injunction without showing previous general user, especially where the patent is for a *process*, as distinguished from a *machine*.
5. Effect of plaintiff's *laches* on his right to an injunction, considered; and, under the circumstances, held not to defeat the right.
6. Expert testimony in patent causes, and the weight to be attached to *ex parte* affidavits, commented on.

(Before MILLER and NELSON, JJ.)

Preliminary Injunctions in Patent Cases.—Effect of Decree or Judgment Sustaining a Patent.—Previous User.—Expert Testimony.—Bond as an Alternative for an Injunction.

THIS suit was commenced in May last, by the complainant, as the owner of the patent by assignment from the patentee, to recover damages in the sum of \$300,000, for an alleged infringement by the defendants of the process for manufacturing flour and purifying middlings, which was patented to William F. Cochrane, originally in 1863, and afterwards by a reissued patent in 1874, on which reissued letters patent the complainant's claim is based. At this term of the court (June, 1877), the complainant's counsel moved, upon the bill of complaint and affidavits, that an injunction be issued, restraining the defendants from using this process in the manufacture of flour until the final determination of the suit. This motion was vigorously opposed by the counsel for the defendants, by models and a large number of affidavits, their defence being that Cochrane, the patentee, was not the first inventor of the process, but that, as long ago as 1856, a description of the same process was published in France as the invention of one Cabanes, and that it was patented by him in England in the preceding year; also that the process had been in use in this country for many years in the farina mills

Middlings Purifier Company v. Christian.

of New York, and that if the complainant ever had any rights, it had lost them through its *laches* or negligence, in allowing so long a time to elapse before asserting them or making them known. On the other hand, the complainant's counsel contended that this process differed substantially from that of Cabanes'; and that in the case of *Cochrane et al. v. Deener et al.*, which was decided by the supreme court of the United States at the last October term, the validity of this patent was fully established.

Rodney Mason, and *John B. & W. H. Sanborn*, for the complainant.

Gordon E. Cole, *H. R. Selden*, *E. B. Selden*, and *Mr. Gridley*, for the defendants.

MILLER, *Circuit Justice*, orally.—In the matter of the application of the American Middlings Purifier Company against John A. Christian & Co., we are *compelled*, this morning, to announce the result of our consultations on it, although, perhaps, very inadequately prepared to do it with perfect satisfaction to ourselves. I must leave to-day, in order to reach the circuit court at Denver, Judge DILLON not being in attendance at that court, and it will have been in session a couple of days when I get there in any event, and, under the circumstances, we must give it the best judgment that we have.

The application is for a preliminary injunction in behalf of the plaintiff, upon allegation that the process used in the manufacture of flour patented by plaintiff's assignor in 1863, and a reissue in 1874, is infringed by the defendants. There is no answer to the bill, and the motion is heard on the bill on the affidavits of plaintiff and the affidavits of defendants. The plaintiff brought suit on this same patent in the supreme court of the District of Columbia, a year or two ago, against Deener and others, for an infringement of it. In the court of that district the plaintiff failed to establish his case. Upon what precise ground the court below rendered its judgment I do not know, and it is not material. The plaintiff here and the plaintiff there took an

Middlings Purifier Company v. Christian.

appeal to the supreme court of the United States, and that case was heard and decided at the last term of court. The decision of the supreme court of the District of Columbia was reversed, and a decree was rendered in favor of the plaintiff in the supreme court of the United States. The effect to be given this decree in the present proceedings is one of the main questions to be determined now. The counsel for the plaintiff in this case insists upon treating it as almost conclusive of the validity of the plaintiff's patent. The counsel for the defendants, in their argument, treat it as of very little value in a suit against the present defendant, who is a different party from the defendant in that suit.

I think that the uniform course of decisions in the courts of the United States, where a previous decision has been had by a circuit court with regard to the validity of a patent, has been to treat it as of the very highest nature, and as almost conclusive in an application for injunction in another case founded on the same patent. No one pretends, no one argues, that such a decision, even by a circuit court, is absolutely conclusive on a final hearing on the merits of the case; but since patents are of such extensive and general operation all over the country, and since the litigation in regard to patents has been found so expensive and so wearisome to the courts, it has become almost a matter of necessity, after the validity of a patent, as distinguished from the question of infringement, has been passed upon by a competent tribunal upon a fair hearing, to treat that decision, in any future application in other courts and against other parties, as strongly persuasive of the validity of the patent; and this is especially so on the question of a preliminary injunction, and there is reason for it. The decision of the circuit court (I am saying nothing about the supreme court of the United States) in such cases is generally, I may add, always, except where there are cases of collusion, the result of careful and deliberate consideration, either of a protracted trial before a jury, or of a careful and full hearing upon depositions before a court. The presumption, therefore, that the title to the patent itself, and its validity (if that

Middlings Purifier Company v. Christian.

were brought in question in one of these suits), was more critically and more thoroughly looked into, and decided upon better hearing and more mature consideration than it can be in a preliminary injunction, is very strong. Therefore, I think I may state it, fairly and correctly, that wherever a patent has been established, even by the decision of the circuit court, under a careful consideration, in a subsequent application, either before the same court or any other, for a preliminary injunction or for any preliminary relief, that decision is of very great weight.

This case stands on better ground than that. The decision which is brought to our notice in this case is a decision of the supreme court of the United States, the court whose judgments are final upon all questions of patent law; whether the parties in interest now were before it or not, its decision as to what is law in the case governs the decision of all the other courts in the United States. Where the question is one of complicated facts, and the facts may be controverted, and are controverted in the supreme court of the United States, with regard to the validity of the patent, of course the decision of that court upon those facts is conclusive, so far as the facts are the same; and, in addition to that, it is a very fair presumption that wherever the validity of the patent is a question which is brought to the attention and consideration of the supreme court of the United States, all the questions concerning that patent which could possibly be before the court, were before it, and were fully and well considered, and received its full and careful attention. I, therefore, cannot agree with the counsel, who has so ably argued this case for the defendants, that the case comes here as though this was the first time the patent was brought before the court.

As regards this particular judgment of the supreme court of the United States, it is assailed on the ground, in the first place, that the validity of the patent was but a minor consideration in the case, and did not receive the full and careful attention of the court; and, in the second place, on the ground that the whole suit, from beginning to end, in which that question was decided, was collusive and fraudulent, for the purpose of procuring the

Middlings Purifier Company v. Christian.

judgment of the appellate court in favor of the validity of this patent.

As to the first proposition, that the question of the validity of the patent did not receive the attention of the court carefully, that is refuted at once by the record of the case, and by the opinion of the court. The record of the case shows that it was assailed; that as many as seven or eight different grounds assailing it were set up in the supplemental answer, filed for that very purpose, and it shows that these questions were argued by the counsel upon their briefs, and it shows that the court turned its attention to the questions that were raised in this defence, especially upon that class of objections which go to show the want of novelty—the one that is most relied upon in this case. I may, perhaps, add my personal knowledge of what took place in court which I do not think I am at liberty to disregard here, although sitting in another court, as to the attention which the whole of this case received. It was submitted to the court on printed argument very early in the term—I should think certainly as early as sometime in the month of October; that is my recollection. It was submitted on printed briefs, on both sides, of—taking them together—I should think, five hundred pages. It was held under advisement by the court before it was decided in conference for two or three months, up to the adjournment just previous to Christmas. It was then decided, and the opinion confided to one of the most careful, laborious, and able patent law judges of the United States. He kept that opinion from the week preceding Christmas until the last week of the session of the court, in March. It underwent, undoubtedly, a careful scrutiny and consideration in every branch of it. It is impossible, therefore, under these circumstances, to infer that all there was in the case did not receive the fullest and most careful consideration of the court. There is another thing that shows that it received the consideration of the court. It is possible, in a court like ours, where we are all of one opinion and at one time, that something may have escaped our attention; but two of the best patent lawyers in that court dissented from the opinion and

Middlings Purifier Company v. Christian.

judgment of the court, as appears by the record. The fact that these judges dissent shows that their objections must have been carefully considered in court, as they were in the conference, and rebuts any suggestion that there was any hasty or ill-advised action in the matter.

As regards the collusion: It is a sad thing to say that perhaps no class of cases coming before the courts have as much fraud, perjury, and wicked conduct generally, as patent cases. The vast amount involved in some of them, the conflicting interests, with a variety of people of all classes—the contest between patentees themselves, in which the sums involved are almost fabulous—lead to perjury and fraud of the grossest kind. It is the undoubted experience of the judges who are familiar with patent cases, that there is a large amount of false swearing and corruption in them. It is possible, therefore—our court has recognized the fact in two or three cases coming before it—that there may be a collusive suit brought to our court for the purpose of establishing a patent, in which the control of the litigation is all upon one side, though apparently there is an honest contest between two parties with regard to it. When, therefore, a proposition of that kind is made, it is to be considered. But there is no attempt here to establish a collusion by any affidavits or proof that either of the parties engaged in that case, in the supreme court of the United States, or in the district court, were committing a fraud. There is no attempt, except from the character of the record itself, to show that there was anything but an honest contest in regard to it. The inference that it was a collusive suit is attempted to be drawn from the circumstances, which, I think, are not at all conclusive, and hardly persuasive. One of these is that the suit was suddenly brought, after the reissue of the patent, and speedily carried through the courts. But a reason for that is quite obvious in the nature of the transaction itself. The reissue, on which alone any of these suits are attempted to be sustained, was made at a time which left but five or six years of the patent to run. The parties owning the patent under it knew—it is now apparent, at least, on these affidavits before me

Middlings Purifier Company v. Christian.

— that it was generally known that the patent would be resisted by a very large and influential body of men. It was nothing, therefore, but sensible, reasonable, and proper that the patentee should select the nearest infringer of the patent, and get his case through the courts in a speedy manner, to decide whether he had such a claim, and that is what he did ; and I see nothing indicative of fraud or collusion in the fact. If it could be shown that the defendants selected had no interest in the contest ; that they were not actually engaged in milling at all ; if it could be shown that they made any suspicious bargain with the plaintiff in that case, all these considerations would go to impeach the character of the case ; but, with a single exception, that after the suit had been decided in favor of the defendants below, the parties agreed to some arrangement about the damages which might be recovered, or the mode of settling the amount of damages, if the plaintiff finally succeeded, there is nothing I can see in the case that justifies a suspicion of any collusion or fraud in the matter. I am, therefore, compelled to hold that that decision possesses all the validity, and is entitled to all the respect and consideration, and to all the weight which any other decision of the supreme court of the United States could have. And I am not aware— I do not believe—that any case exists or can be found in which an inferior court has held, on an application for a preliminary injunction, that the decision of the supreme court of the United States establishing the validity of a patent can be assailed in the court below. I do not myself go so far in this case as that. I do not say on this application it could not be shown that a patent was invalid if the evidence was strong enough to overcome the credit that is due to the judgment of the supreme court of the United States. But I say there is no precedent for holding that even that can be done ; and I certainly am unwilling, myself, sitting here as a circuit judge, to hold that that decision is of no more weight and character than the decision of a circuit court, which is open to re-examination in the supreme court of the United States, which might be carried up there and reversed, and which is made by only one of the judges of an inferior court.

Middlings Purifier Company v. Christian.

Other considerations are brought to bear in this particular case, conceding the force to be given to that decision by this court, why the injunction in this case should not be granted. The first of these is a statement by counsel for the defendants, that no injunction can be granted unless there has been proof of previous user of the patent by plaintiff, or parties claiming under the same patent, and it is denied that there is any such proof here. If any very extensive evidence of previous user is an indispensable thing to the granting of an injunction, I am prepared to admit that it is not proven in this case. But I do not understand that previous user is an absolute and indispensable element of granting an injunction. I understand it stands only as one of the means or modes of satisfying the court of the right of the plaintiff to an injunction. It is to be presumed that when a party has used publicly and notoriously for any considerable length of time a patent, claiming exclusive right to it, the public have acquiesced in that claim, and against a man who comes to infringe it and to contest the rights of the plaintiff, there arises a presumption in consequence of that user, which is a very strong one; but does that user afford as strong a presumption as a deliberate contest in a suit through a circuit court and up to the supreme court of the United States, of the validity of the patent and the right of the plaintiff to its exclusive use? This is the thing to be established. This is the foundation. If this is conceded, or is established, the right to the injunction is clear, whether there is user or not; and to hold that no injunction can issue without several years previous user, is, in effect, to hold that if the public combine not to use a man's patent — the general public — or if he can't introduce it into use, or if he can't convince the public that it is a thing profitable to be used, and if it is (as it is in this case) of a thing that he can't, and probably will not, use himself, but is intended for the use of others, in a large measure, why it would follow, as a matter of course, that he never can get an injunction; and that his patent may run out and he never can get any value of it at all, because he has been unable to get anybody to use it. This is particularly applicable with reference to this process pat-

Middlings Purifier Company v. Christian.

ent, because it is a patent, not for a machine, not for a product, not for an article, not for a patent medicine; it is a patent for a process or mode of doing a particular thing which is being done all over the world. How could he establish a user in this case unless he himself was able to own an extensive flouring mill, or to pay somebody to use his patent enough to make it a general user? I do not think there is anything in that question as applicable to the present case, and especially in view of the fact which I shall now proceed to consider under the second objection, and that is *laches*. In other words, the argument of the defendants is that the plaintiff, having procured his patent in 1863, laid by and took no steps to enforce it against anybody until 1874 or 1875. That argument struck me at first as having a 'good deal of force in it, and it is founded, if it were true, and there is no excuse for it, in very strong principles; because if a man has a patent of that kind and he sees the world at large using it for eight or ten years, takes no steps to arrest it, sues nobody, sets up no claim, gives no warning, it is a very natural and strong reason why, under these circumstances, he should not be permitted to come subsequently and arrest everybody by process of injunction. In each and in every case that question depends upon its own facts.

However, it is apparent that in the original patents issued in 1863, there were defects in the specifications, which rendered them unavailable, in the estimation of the plaintiff, in a suit against anybody who was infringing them, for the reason that they really included the rights of the prior patentees, Cogswell & McKiernan. He, therefore, before he commenced any contest with these parties, who were very numerous and very powerful, was under the necessity of giving up his patents and asking a reissue, not that he might enlarge his claim, as so often is done to the detriment of the public, but, in point of fact, that he might diminish and limit his claims, which he did, being aware that he had to enter into a severe contest, and, therefore, equipped himself by casting off all that might embarrass him, and restricting his patents to that which he thought he could

Middlings Purifier Company v. Christian.

carry; and this he had a right to do, and in this he was wise. There was, therefore, no *laches* in that matter, unless, during all this time his patents, as they originally stood, were in general use, and in such use as to attract his notice and attention. The affidavits of the *defendants* remove that difficulty or objection, because, unless we consider the production of farina by a particular process as infringing the patent, the defendants themselves here show, by their own affidavits, that what is called the new process milling commenced in this country about 1871 or 1872, and they assert that, and insist upon it in their own affidavits; so that, supposing the plaintiff in this case to have been vigilant, as vigilant as any man could expect him to be, it was only about 1871 or 1872 that there was any general attempt to use his patent or to infringe it, and then, if you will suppose him to have instituted his inquiries with a view to commence proceedings, it is no great length of time to allow him a year or two to see how far his patent covered those supposed infringements, and how far his patent, as it existed, could be enforced against them. And so, up to the time that he got out his reissued patent, I see no reason to charge him with any *laches* or negligence in the matter; and it will hardly be pretended, I think, that *laches* could be imputed to him after that time, because since he got his reissue of the patent, he selected the nearest and quickest opportunity to bring it to the test of the courts.

The main difficulty and embarrassing part of this case, to me, and to my associate, is the next question that presents itself, and that is, the endeavor, by affidavits, and exhibits, and models, to show, in point of fact, that the patent of the plaintiff was anticipated—that it was not novel, and that it was, therefore, void. In other words, to show that the decision of the supreme court of the United States, holding that it was a valid patent, was an erroneous decision, and not, as counsel very courteously says, because it made a mistake in principle, but because there was a defect of the testimony in that case which is supplied in this.

That branch of the subject is embarrassing for two or three reasons. In the first place, I do not pretend—I cannot speak

Middlings Purifier Company v. Christian.

for my associate in that regard—that I am as competent to decide it as some other judges more conversant with patents and scientific principles. In the second place, I have no confidence myself in the impression produced by any number of *ex parte* affidavits of experts. My own experience, both in the local courts and in the supreme court of the United States, is that, whenever the matter in contest involves an immense sum in value, and where the question turns mainly upon opinions of experts, there is no difficulty in introducing any amount of them on either side; and yet this class of cases is one in which there is value to be attached to experts. But if I had time to sit down and examine, one by one, all of these affidavits, most of which, although they are supposed to be treating of patents, only amount, after all, to saying, each one of them, “as I understand it, such and such a thing was done,” or, “as I understand it, such and such a thing was not done,” and, “as I understand it, such and such a patent involves such and such a principle, and others do not,” all of which, after all, was only their opinion, although they state them as facts; I say if I had time (and that would require two or three weeks), I might possibly go into this thing and reach an opinion which would, at least, be satisfactory to me, whether that patent was anticipated, and is, therefore, invalid. But I do not feel at liberty, in the face of what the supreme court of the United States has decided, after five or six months deliberation, upon these *ex parte* affidavits, which I have not the time to examine fully, to hold, in reference to this temporary application, that this patent is invalid; and that is about all I will say on that subject, because it is all that is necessary to say, since the whole subject will be fully investigated hereafter, when the defendants will have the fullest and fairest opportunity, after they have filed their answer and stated specifically upon what prior use, prior patents, or prior publications they intend to rely, after they have brought them to the test of depositions, witnesses cross-examined, models carefully looked into in the presence of the court, and explained; after all that they will have an opportunity to have full justice, and if they can show that this

Middlings Purifier Company v. Christian.

patent is invalid, as I hold it is not conclusively shown, they will have an opportunity to do it. But I do not now think that I would be discharging my duty to decide on this hasty hearing, that this class of affidavits, which, as I heard them read, and as I have looked into them in my private room, do not satisfy me of the proposition of the defendants, that I was at liberty, because of their number, to hold that this patent is an invalid patent.

There are two other reasons urged, not against this patent, not against the patent itself, but which, admitting the patent to be a valid patent, why the injunction should not be granted. The first of those is that there is actually no infringement proved; the infringement is denied by the affidavits, even conceding the patent to be valid. As to that, it is hardly necessary for me to say more than that the defendants themselves creditably and manfully rely upon impeaching the patent, and hardly venture to say that they have not used the process of the plaintiff. Their whole evidence goes to show that they have used, and they insist that they have used a machine which destroys the plaintiff's patent because it antedates it. They themselves have narrowed the question, then, not to one of infringement, but to the validity of the patent. It is manly in them to do so. I have no doubt myself that this is to be the test case, unless the one already decided is; and I take the liberty of saying that the cross-imputations of the gentlemen here, about fraudulent misconduct on both sides, seem to me utterly without foundation. The plaintiff has shown himself a worthy foe, and a manly one, through the whole of this contest. He prepared himself in proper panoply when he went to the supreme court of the United States and got his decision before he attempted to trouble the little mills all over the country. When he has got himself ready for the fight he selects the advance foe, the party who says, "I own the largest mill in the western world," and who has the assistance of all the other millers, with notice to come and defend his suit. Knowing that fact, the plaintiff selects that very party as the one upon whom he makes his first attack. If

Middlings Purifier Company v. Christian.

he had no faith in his patent, if he had intended to go around and blackmail the smaller manufacturers, he might have hunted up those who couldn't defend, in little out-of-the-way places. He has not done it, and he makes an open battle. Defendants also make a manly defence. Although they say they don't think they have infringed, they come squarely up and say they mean to fight the validity of the patent. They have a right to do it, and they will have it under this decision. I hope this case will prove an exception to the fraudulent devices which have been practised, and that both parties will conduct this suit hereafter in that straightforward way which has characterized them both up to the present time.

The defendants also say that because they are of great ability and amply able to respond to any damages that may be obtained by the final decree, and because their operations are very extensive, and the issue of an injunction would interfere very largely with their business, would be productive of much more harm to them than the refusal of the injunction would be to the plaintiff, therefore the injunction ought not to be issued.

In regard to the issuing of an injunction, I do not think that the ability of the respondents to pay ultimate damages ought to be *very much* considered in this case. It is a matter worthy of very great consideration that the patent of the plaintiff will expire inside of three years from the date of this present application.

It is very easy for the defendants—very probably the defendants will contest this case so severely that no final decree will be obtained until the patent is exhausted, and it will remain a question of very grave doubt whether any decree rendered for damages after the expiration of the patent—unless some preliminary measure has been taken to give validity to it—would cover those damages. It is therefore important, it is absolutely necessary, if the plaintiff has any just claim, that the relief should be granted. It should be such as would enable it, if it finally got a decree, even if it was five or six years hence, to realize the benefit of this litigation. I am, therefore, of the opinion (in which my

Middlings Purifier Company v. Christian.

brother NELSON concurs), that it is our duty to grant the relief asked in this case, subject to a further provision, which has been well considered in previous cases, and which we have a right to apply, and which we propose to apply in this case. And in that view of it the responsibility and ability of the respondents is a great inducement to us to make the order which we propose to make, and that is an order granting the injunction, unless the defendants, within a reasonable time—say such time as convenient to my brother judge here, ten or twenty days—shall come in and give the bond which has often been required in such cases. In that view of the subject we think that nobody will be hurt. The defendants are amply able to give that bond.

The bond will be conditioned for the payment of any final decree for money in favor of the plaintiff in this case, and conditioned for their keeping an accurate and faithful account of the amount of flour made by them in their mills with the machines which they admit they use, and for a report of that once every three months to the court, under oath.

I am very happy to be supported in nearly all that I have said, certainly in all that we have decided on this subject, by the case referred to by counsel for defendants, of *Forbush v. Bradford*, 1 Fisher's Patent Cases, 318.

Judge MILLER here read from this decision, and after hearing counsel in behalf of the respective parties, said: "Under all the circumstances of the case, we think that a bond for two hundred and fifty thousand dollars will be sufficient; we do not think that will be oppressive. That will be the order."

ORDERED ACCORDINGLY.

NOTE.—The supreme court, in December, 1877, refused to set aside the decree in the Deener case, the imputed collusion not being shown, but reserved the rights of other persons interested in the question of the validity of the Cochrane patent.

See *American Middlings Purifier Company v. Atlantic Milling Company*, ante, p. 100.

Bailey v. Sawyer.

C. P. BAILEY, Receiver of the First National Bank of Duluth,
v. ANDREW J. SAWYER.

1. In winding up an insolvent national bank the comptroller of the currency is vested with authority to determine when a deficiency of assets exists, so that the individual liability of the stockholders may be enforced, and no appeal lies from his decision.
2. The liability of a stockholder of a national bank is several. When a specific assessment upon the stockholders is ordered by the comptroller, a suit at law is a proper remedy to enforce it.

(Before NELSON, J.)

National Banks.—Liability of Stockholders.—Assessment by the Comptroller.—Remedy.

THIS is a common law action brought to enforce the individual liability of a stockholder in the First National Bank of Duluth, and to recover the amount of an assessment ordered by the comptroller of the currency, to the extent of seventy-five per centum of the par value of the shares of the capital stock of said bank, under and by virtue of the act of congress in relation to national banks.

A demurrer is interposed to the complaint. Upon the argument it is urged :

1. That the complaint should set forth the facts and data upon which the comptroller determined that a necessity existed which authorized proceedings to enforce the individual liability of stockholders.

2. That the suit should have been in equity, and not at law.

Mr. W. W. Billson, for the demurrer.

Messrs. Ensign and Cash, contra.

NELSON, J.—The comptroller of the currency, by virtue of the national banking law, in winding up an insolvent bank, is vested with authority to determine when a deficiency of assets exists, so that the individual liability of the stockholders may

Bly v. United States.

be enforced. This liability is conditional, and was so held in *Bank v. Kennedy*, 17 Wall. 22, but the comptroller, in the exercise of a judicial discretion, decides, upon the data before him, when "it is necessary" to compel contributions from stockholders to pay the debts of the bank. The law clothes him with this authority, and no appeal lies from his decision by a stockholder. He appoints a receiver, and resorts to the ultimate remedy whenever, in his judgment, the condition of the bank requires its enforcement. And, as stated in *Kennedy v. Gibson et al.* 8 Wall. 504, a more speedy settlement of the affairs of an insolvent bank is thus obtained. Again, this obligation of the stockholder is fixed when he becomes a member of the corporation by taking stock therein, and is several, not joint. There is no necessity for invoking the aid of a court of chancery to determine the sum each stockholder must pay, for that is regulated by the number of shares of stock owned. When the comptroller declares and orders an assessment, the precise amount each stockholder must contribute is a certain exact sum. A suit at law would seem to be the suitable proceeding to collect the assessment.

DEMURRER OVERRULED.

E. H. BLY, plaintiff in error, v. THE UNITED STATES, defendant in error; B. F. HARTLEY *et al.*, plaintiffs in error, v. THE UNITED STATES, defendant in error; THE UNITED STATES v. DAY *et al.* (indictment.)

1. In certain civil and criminal actions by the United States against trespassers upon its unsold timber land: *Held*, that the official plats and books in the office of the register of the United States land office are admissible as evidence on its behalf to show that the land on which the timber was cut had not been sold by the United States.
2. Parol evidence is not admissible on behalf of the defendants to show that the *locus in quo* was swamp land within the meaning of the swamp land grant to the several states.

 Bly v. United States.

3. The cutting of timber upon the public lands is a criminal offence (Rev. Stats. sec. 2461), and the government may proceed both civilly and criminally.
4. Where timber is cut upon the public lands wilfully, fraudulently, or negligently, and without authority, and made into saw-logs, the government may replevy such logs even when they have reached the boom, or, at its election, may sue in trover for their value, and in either case may recover without deduction for their enhanced value, after severance from the freehold, arising from the labor of the wrong-doer. In such case the government is not confined to the "stumpage" value. (*Nesbit v. St. Paul Lumber Company*, 21 Minn. 491.)
5. Whether a different rule of damages would apply if the trespass were neither wilful, fraudulent, nor negligent, *quære?*

(Before DILLON and NELSON, JJ.)

Cutting Timber upon Public Lands.—Evidence.—Remedy of Government.—Indictment.—Replevin.—Trover.—Measure of Damages.

THE government has brought numerous civil suits in the nature of trover to recover the value of pine saw-logs cut upon the public lands by the defendants or their vendors, and which, before the suits were commenced, had been rafted and brought down into the booms at Minneapolis, Brainerd, and other places. It has also caused the persons who cut the timber to be indicted. Certain questions of law arising in these cases were argued and decided as shown in the opinion of the court.

Mr. Billson, district attorney, for the United States.

Messrs. Davis, Bradley, Secombe, and others, for the plaintiffs in error.

DILLON, *Circuit Judge*.—1. I am of opinion that the official plats and books in the office of the register of the United States land office, produced and explained by that officer, were admissible in evidence on the part of the government to establish, or as tending to establish, the fact that the lands in question had not been sold by the United States.

Bly v. United States.

These plats and books are the official records of the office, and are kept by the register so as to show what lands are taken under the pre-emption, homestead, or other laws of the general government. These official records, in connection with the testimony of the register, showed that the *locus in quo* was vacant land which had never been disposed of by the United States, and were sufficient *prima facie* to establish that fact. (*Galt v. Galloway*, 4 Pet. 332, 343.)

2. Where the proof shows that the lands have not been sold or disposed of by the United States, and the government proves that the defendant cut timber thereon, and the defendant introduces no evidence of right or title from the United States or the state, we are of opinion that parol testimony on his behalf is not admissible to prove that the *locus in quo* is "swamp" land within the meaning of the swamp land grant.

3. The cutting of timber upon the public lands is made a crime by the legislation of congress, which may be prosecuted by indictment (Rev. Stats. sec. 2461), notwithstanding the provisions of section 4751. And the government may proceed against trespassers upon its land, civilly or criminally, or both, at its election, and judgment in one form of remedy is no bar to the prosecution of the other remedy. The principle of the decision of Mr. Justice MILLER in *The United States v. McKee*, *ante*, has no application to such a case.

It sues in these cases civilly, as the proprietor of the trees or timber which have been unlawfully cut and removed from its lands, to recover the value thereof. And it prosecutes the trespassers criminally in its sovereign capacity for a violation of its criminal statute in that behalf.

4. Where timber has been cut into logs upon the public lands by a person who knows that the land belongs to the government, or who has no reasonable ground to believe that it belongs to him, or to some one under whom he claims, and such logs are by him hauled to the water-course, and rafted and taken to a distant boom, by means of which labor of the wrong-doer their value is much enhanced beyond their value when first sev-

Bly v. United States.

ered from the freehold, the government may replevy such logs in the boom, or may maintain an action in the nature of trover for their value, and in either case may recover without deduction for the enhanced value which may have been given to the logs after the severance from the freehold, by the labor of the wrong-doer. In such a case the government is not confined to what is called the "stumpage" value, but may recover the value of the logs in the boom.

As in such case the title of the government to logs thus cut continues as against the wrong-doer and all persons (*Town v. Dubois*, 6 Wall. 548), until at least there has been some greater transformation of the original property than exists while it remains in the shape of logs, if the wrong-doer sells the logs to a person who has no actual notice that they were cut on the public lands, still the government may maintain replevin against such vendee for the logs, if they are in existence, or if he has sawed them into lumber (which is a conversion of the logs), the government may recover from him the value of such logs, when so manufactured into lumber, and is not confined to the "stumpage" value.

On this last proposition the authorities are conflicting, and we adopt and follow the decision of the supreme court of the state upon the point. (*Nesbit v. St. Paul Lumber Company*, 21 Minn. 491.)

The rule above laid down is the only one which will effectually protect the timber lands of the government which are remote from settlements and in the wilderness. As against the willful or negligent trespasser the rule of damage indicated is not unjust, and as against his vendee it is perhaps the logical and necessary result of the property in the logs still remaining in the government. At all events, it is the rule which has been approved by the supreme court of the state in the case before cited.

It may also be observed that the conclusions reached have a strong support in the adjudicated cases. (*Silsbury v. McCoon*, 3 Comst. 379; *Riddle v. Driver*, 12 Ala. [N. S.] 590; *Betts v. Lee*,

Bly v. United States.

5 Johns. 348; *Ellis v. Wire*, 33 Ind. 127; *Schulenburg v. Harriman*, 2 Dillon, 398, 404.)

But there are cases which assert principles more or less in conflict with the cases just cited. (*Moody v. Whitney*, 38 Maine, 174; *Single v. Schneider*, 30 Wis. 570; *Wetherbee v. Green*, 22 Mich. 311—an instructive case.)

There is also a class of cases, English and American, which hold that where coal or mineral ore is taken by one person from the land of another, the ordinary measure of damages in trespass or trover is the value of the coal or mineral when it first became a chattel, or was converted, and not the value of the coal or ore in place, or as it lay in the earth. The principal cases on this subject are cited and commented on in *Barton Coal Company v. Cox*, 39 Md. 1, S. C. 17 Am. Rep. 525; *S. P. McLean Coal Company v. Long*, Sup. Ct. Ill. Oct. 1876; *in re United Merthyr Collieries Company*, Law Rep. 15 Equity Cases, 46; S. C. 5 Eng. Rep. (Moak's ed.) 707.

The cases last referred to have generally arisen between adjoining owners, and the mitigated rule of damages which they lay down may have been adopted in consequence of the difficulty of ascertaining boundaries in subterranean mines, and it does not apply where the trespass is fraudulent, or willful, or negligent. At all events, the doctrine of these cases should not be extended to cases of willful or negligent trespasses upon the public timber lands of the government.

If a private proprietor of timber lands used due precautions to ascertain his boundaries, and, by mistake of the surveyor, or without negligence or fault on his part, or that of his servants, unintentionally cuts on the adjoining lands of the government, he in good faith supposing he was cutting on his own lands, and the government neglected or delayed to bring trover until the logs thus cut were enhanced in value two or three hundred fold by the labor of bringing them to market, in such a case it may be that the court would be warranted in directing the jury to allow as damages the value of the logs when first severed, and interest on that value.

Bly v. United States.

I am inclined to think the true doctrine of the measure of damages in trover is sufficiently flexible to allow this to be done when justice requires no greater recovery; but the cases now before the court do not require a judgment on the point, and I leave it open for further consideration, should it arise.

NELSON, J., concurs.

JUDGMENT ACCORDINGLY.

NOTE.—The owner of land may replevy timber severed by a wrongdoer; and accordingly it has been held that the United States may maintain replevin for timber cut on the public lands, and even for timber cut and sold by Indians on land reserved to them, as the fee is in the government, and only a right of occupancy in the Indians. (*Johnson v. McIntosh*, 8 Wheat. 574; *United States v. Cook*, 19 Wall. 593; *Beecher v. Weatherbee*, U. S. Sup. Ct. October term, 1877.)

In an action of ejectment—*Clouser v. Joplin Mining Company*—in the western district of Missouri, at the April term, 1877, the circuit judge (KREKEL, J., concurring), charged the jury as follows, in respect to the measure of liability for ores taken out of the land and sold by the defendant:

“On this subject, no uniform rule applicable to all circumstances and all cases exists. Here is a case where (if the plaintiff is entitled to recover at all) the parties were in fact tenants in common, and where each party claimed the whole, and each denied any right in the other; where the defendants were rightfully in possession (for one tenant in common has as much right to the possession as another); where the plaintiff was absent, and for years had paid no attention to the land; where the defendants developed, if they did not discover, the lead mines and worked the same and took ore therefrom; the defendant company was organized and went into possession in 1874, the plaintiff appeared and set up a claim to the land in 1875, each party then claiming the whole. Under such circumstances, the court approves the rule laid down by the supreme court of Pennsylvania: where ‘a tenant in common exercises his undoubted right to take the common property, and has no other means of obtaining his own just share, than by taking at the same time the share of his companion—the value of the ore in place is the only just basis of account.’ (*Coleman’s Appeal*, 62 Pa. St. 278; *Barton Coal Company v. Cox*, 30 Md. 1, S. C. 17 Am. Rep. 525, 531, and cases cited.)

“Under the statute of Missouri this rule may properly be applied in measuring the right to a recovery in respect to ores taken when one tenant in common recovers in ejectment against another.” (*Wag. Stats.* p. 560, sec. 13.)

Andrews v. Spear.

WILLIAM D. ANDREWS *et al.* v. O. E. SPEAR; SAME v. JOEL B. BASSETT; SAME v. SWEET W. CASE; SAME v. ANTHONY KELLY; SAME v. WILLIAM L. NICHOLS; SAME v. ROBERT L. PLATT; SAME v. STEPHEN PRATT; SAME v. OTIS A. PRAY; SAME v. CYRUS L. SNYDER.

Where a number of suits of like nature, and involving the same issues, are pending at the same time, the court may, in its discretion, order that one case be tried and determined as a test case for all, or that the several causes be consolidated and tried together. This rule applies as well to cases in equity as at law.

(Before NELSON, J.)

Practice.—Test Case.—Consideration of Causes.

APPLICATION is made to the court, and affidavits presented by the solicitors for the several defendants, who, to avoid costs and unnecessary expense, ask that these suits, which involve the same issues, and depend upon the same testimony, be consolidated, or one of them be selected as a test case, and proceedings in all others be stayed until such test case is determined; or that the court order that the testimony shall be taken in one case, to be selected by the complainants, and that such testimony be read in every case, or for such other relief as may be just.

Messrs. Davis, O'Brien, & Wilson, for the defendants.

Mr. John Y. Page, for the plaintiffs.

NELSON, J.—These suits were brought to test the validity of a patent for an alleged new and useful improvement in wells—commonly known as the “drive well”—for damages for its infringement, and to restrain the defendants from further manufacture and use. The bill of complaint in some of the cases alleges the manufacture of the drive wells, and in others the use. Issue has been joined in all the cases. The same solicitors appear for all the defendants, and agree to enter a stipulation in writing that judgment may be entered in

Andrews v. Spear.

all the cases if the final decision in one shall be in favor of the complainants. It is admitted that one case of each class, when decided, will dispose of all the others of the same class, and that the testimony relating to the issues in one suit of a class will apply to all of the same class.

In view of these admissions and proposed stipulation, it would be manifestly unjust for the court to compel each defendant to incur the expense of preparing for hearing and argument if it can be avoided. It is not unusual in actions at law, and the reasoning applies equally to equity cases, to grant such applications. The plaintiffs are not injured thereby, but rather benefitted, for they are relieved from the trouble and expense of preparing numerous causes for hearing, where only the same questions are involved. The court can interpose a check to the argument of a multiplicity of these issues, irrespective of any concessions made by the parties, with a view to prevent useless waste of time and expense, and this application is within the spirit, if not within the letter, of section 921 of the Revised Statutes of the United States: "SEC. 921. When causes of a like nature, or relating to the same question, are pending before a court of the United States, or of any territory, the court may make such orders and rules, concerning proceedings therein, as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

When the solicitors for the defendants sign and file in court consent that judgment may abide the event of a trial in one case of each class, the following order may be entered: "That all the causes of each class abide the event and final determination of the one of that class which the plaintiffs may elect to prepare the evidence in, and set down for hearing and argument, and that whatever decree may be finally rendered in the cause set down for hearing shall be entered in all the causes of that class, and either party shall be at liberty to have the records therein made and entered accordingly, unless, upon proper showing, additional and lately discovered evidence, relevant to the issues,

Andrews v. Spear.

which could not be procured and submitted in time, should be brought forward, and a rehearing asked and granted for that reason."

ORDERED ACCORDINGLY.

WILLIAM D. ANDREWS *et al.* v. O. E. SPEAR.

A preliminary injunction in a patent cause was denied where the suit in which it was asked had been pending for many months, and was nearly ready for final hearing, and no ground for the writ was shown which was not known to the complainants at the time the suit was instituted.

(Before NELSON, J.)

Patent for Invention.—Preliminary Injunction against Infringers.

THE bill of complaint was filed November 10th, 1876, an answer filed February 5th, 1877, and the case put at issue March 27th, 1877. The testimony of both parties is being taken before a master, with a view to an early submission of the controversy.

An application is now made for a temporary injunction upon the pleadings, affidavits, and a decision of the United States circuit court in the eastern district of New York, rendered in April, 1876, and certain proceedings instituted in the district court of Hennepin county, Minnesota, on the return of an execution against the defendant unsatisfied, March 14th, 1877.

Mr. John Y. Page, for the complainants.

Messrs. Davis, O'Brien, & Wilson, for the defendants.

NELSON, J.—I decline to grant a preliminary injunction at this time. The suit was instituted in November, 1876, and, as appears from the papers before me upon this motion, is in preparation for final hearing at the next term, in December. The evidence of witnesses already taken before the master, has been

Andrews v. Spear.

used as affidavits to be considered in disposing of the motion, and I am asked to examine it with reference to the claim for this preliminary injunction in advance of presentation at the final hearing. I do not think, at this late day, after nearly a year has passed since the commencement of this suit, and it is about to be argued and submitted upon the merits, I am required, in the exercise of a sound discretion, to give complainants the preliminary relief asked.

The principal reason urged upon this application is, that a previous decision has been rendered in a suit in the second circuit sustaining the validity of the patent. This court has recognized the great weight to be given such a decision upon an application for an injunction (*American Middlings Purifier Company v. Christian, ante*), but, inasmuch as it was rendered six months before the commencement of this suit, and the complainants here were parties thereto, and fully aware of the effect of such decision in their behalf, some more persuasive reason must be urged, which will account for this delay, until the case is now about to be submitted and considered upon the pleadings and all the evidence. The pecuniary condition of the defendant is not changed from what it was in March last, and cannot be considered now as a controlling reason for granting the injunction.

The complainants have leave to renew this application in case the suit is not heard at the next regular term.

MOTION DENIED.

NOTE.—As to preliminary injunction against infringers of patents for invention: *American Middlings Purifier Company v. Atlantic Milling Company, ante*, p. 100; *Same v. Christian, ante*, p. 448.

Craigie v. McArthur.

BARBARA CRAIGIE *et al.* v. ANNIE MCARTHUR.

1. A contest in regard to the distribution of the estate of a deceased person, where the amount involved is sufficient and the citizenship of parties is such as would confer jurisdiction, is a "controversy" that may be removed from the state to the federal courts under the provisions of act of congress of March 3, 1875.
2. Such removal, however, must be before trial in the court of original jurisdiction, and cannot be made from a court to which, after hearing, an appeal has been taken.

(Before NELSON, J.)

Removal of Causes.— Act of March 3, 1875.— Nature of Suit.— Time.— Court in which Application Must be Made.

JAMES G. CRAIGIE died in Otter Tail county, in the state of Minnesota, September 8, 1872, leaving real and personal estate, and on petition of Annie McArthur letters of administration were granted to her March 13, 1876, by the probate court of that county. On May 18, 1876, the administratrix filed a petition for a final accounting, and for distribution of the estate, in which she claimed to be the sole heir at law of said James G. Craigie, deceased, and prayed that a decree be entered assigning to and vesting in her all the real and personal property in her hands or otherwise, belonging to said estate. A citation was issued by the probate court, fixing June 13, 1876, as the day upon which a hearing would be had of the matters contained in the petition, and notice to all parties interested was ordered to be given by publication in a newspaper, to show cause, on that day, why the prayer of the petition should not be granted. Objection was filed in writing, on the day fixed for the hearing, by Barbara Craigie, John Craigie, Charles Craigie, Alexander M. Craigie, Elizabeth Enslie, Ann Clark, and Ellen R. Shephard, and, after the hearing and due consideration of the same, a decree was entered June 14, 1876, which, after reciting the proceedings in the administration of the estate, is as follows: "Now, therefore, it is ordered, adjudged, and decreed that the adminis-

Craigie v. McArthur.

tration of the estate of said James G. Craigie be and the same is hereby concluded, and that the administratrix of said estate be and she is hereby discharged, and that all and singular the property and estate which was of the said James G. Craigie at the time of his death, and the increase thereof, * * * be and the same are hereby distributed, assigned to, and vested in the said Annie McArthur as the heir, and sole heir at law, of the said James G. Craigie."

On August 9, 1876, all the persons appearing and contesting the matters set up in the petition of Annie McArthur, with the exception of Alexander M. Craigie, took an appeal, by virtue of the statute of the state of Minnesota, to the district court of the seventh judicial district, and the same was perfected, and a certified transcript of all the proceedings had in the matter, and all the papers, petitions, orders, decrees, notices, etc., were filed in the clerk's office October 10, 1876.

A petition was filed for a removal of the suit under act of congress of March 3, 1875, in that behalf, to the United States circuit court for the district of Minnesota, October 18, 1876, setting up:

1. That an action has been commenced and is now pending in the district court of the seventh judicial district, on appeal from the judgment of the probate court, in which the petitioners are appellants, and Annie McArthur respondent.

2. That since the commencement of said action by said appeal in said court, there has been no term at which a trial of said action could be had.

3. That the amount in dispute is over five hundred dollars, exclusive of costs.

4. That at the time of the commencement of said action, all the appellants were and are aliens, and subjects of Victoria, queen of Great Britain and Ireland, and reside in Scotland.

5. That the respondent is a citizen of the state of Minnesota, and resides therein.

The proper bond was executed and the action was transferred, and a return was filed in this court December 8, 1876.

Craigie v. McArthur.

A motion is now made to remand the suit to the state district court, for the reasons :

1. That it is not such an action as the said United States circuit court can acquire jurisdiction of under any of the acts of the congress of the United States pertaining to the removal of causes from state courts.

2. That if this court could have jurisdiction of the cause, the petition and bond for its removal should have been presented to and filed in the state court of original jurisdiction, to-wit: the probate court of Otter Tail county, before or at the term of said court at which the cause could first be tried, and that the appellants having submitted themselves, by due appearance, to the jurisdiction of the said probate court, and gone to trial there upon the merits, it is too late to first apply for a removal to the United States court after appeal taken from the judgment of said probate court to a higher and appellate state court.

Mr. Chas. D. Kerr, for the motion.

Messrs. Bigelow, Flandrau, & Clark, and E. E. Corliss, contra

NELSON, J.—Conceding, for the sake of the argument, that the probate of a will and the appointment of an administrator of an intestate's estate are not proper subjects to be determined in the federal courts, yet, when the estate is ready for distribution and a claim is made for the whole of the estate or a portion thereof, and contested, if the necessary conditions exist, I think a removal is authorized on proper application being made. All the essential elements of a controversy exist. There are parties, and a contest in reference to property, and informal pleadings under which the disputed matters are to be settled by a court.

The act of congress authorizes a removal from a court of limited or general jurisdiction, and a controversy in a probate court involving the distribution of an estate between parties who appear and submit to the jurisdiction and litigate therein, is certainly a suit of "a civil nature * * * in equity." (45 Maine, 571; 4 Pa. St. 301; 22 N. Y. 421; 20 Minn. 247; 19 Wis. 200.)

Craigie v. McArthur.

The probate court of the state of Minnesota is a constitutional court of record, with a seal, and regular terms fixed by law (sec. 1, art. 6, Const. Minn.; 2 Bis. Stats. 739; 1 *Ib.* p. 672, sec. 169). Its decrees, orders, and judgments are binding upon all persons, and the right of appeal is given to the district court, and finally to the supreme court of the state. Pleadings are not necessary, but all applications made to the court orally or in writing are embodied in its records. At the time when the proceedings in that court assume the form of a controversy between parties, and the conditions requisite exist, the suit is removable. (*Gaines v. Fuentes et al.* 2 Otto, 14.)

When, in answer to a notice of the hearing of the matters to be determined in the probate court, the petitioners filed their objection and instituted a contest, the right of removal could have been enforced. It is urged that there is no controversy *inter partes* in the probate court, and that the appeal is the commencement of a new suit, when, for the first time, it is known who are the parties interested. I do not so understand the situation of such controversies. The notice authorized to be published by the probate court fixed the time when the matters set forth in the petition would be determined by the court, and specified the several questions which would be settled. If no objection is made, a decree in accordance with the prayer of the petition would be conclusive; but opposition being made, a hearing or trial must take place, and all the matters at issue litigated.

When the contestants interposed objections, certainly the parties to a controversy were known, and the decree was binding upon them, as well as all others interested.

It is too late, after the determination of the litigated matters in the probate court, and an appeal taken to the district court of the state, to initiate steps for a removal. No such right then exists, and to entertain jurisdiction would be an attempt to exercise a revisory power over the judgment of the probate court which is given by law to another tribunal.

This court has entertained jurisdiction of the removal of a suit pending in a state court, on an appeal from commissioners

Craigie v. McArthur.

appointed by that court to fix the value of private property taken under the right of eminent domain, by an incorporated company (3 Dillon, 465); but this appeal is of an entirely different character. In the former case, the appeal was from an appraisement by commissioners authorized under the charter of the company, which provided for an appeal from the award to the district court, and upon the appeal being taken the clerk is authorized to set it down as a cause upon the docket of the court appointing the commissioners. A suit, then, for the first time is instituted in a court. In the case before me, the initiatory proceedings and contest were in a court recognized as one of the judicial tribunals of the state, and the appeal was from a decree of that court.

The removal of a suit, under the act of congress of March 3, 1875, must be from the court of original jurisdiction.

DILLON, *Circuit Judge*.—I am of opinion that the removal was not applied for in time, under the act of March 3, 1875, and that the cause should be remanded.

REMANDED.

REPORTS OF CASES DETERMINED

IN THE

Circuit Court of the United States,

FOR THE

DISTRICT OF IOWA.

UNITED STATES, *ex rel.* HALL *et al.*, v. THE UNION PACIFIC
RAILROAD COMPANY.

1. The charter of the Union Pacific Railroad Company (12 Stats. at Large, 489, sec. 12) required its Iowa branch to be constructed westward from a point on the *western boundary of the state of Iowa*, to be fixed by the president of the United States: *Held*, on a consideration of various provisions of the charter, that the eastern terminus of said branch was on the Iowa shore of the Missouri river, and not on the Nebraska shore, nor at a point "on the middle of the main channel" of the river, although that was the legal western boundary of the state of Iowa.
2. The right to erect a bridge across the Missouri river to the eastern terminus of the Iowa branch on the Iowa shore, was given to the Pacific Railroad Company by implication in the original charter of the company, and was expressly conferred by the ninth section of the amended charter of the company, of July 2d, 1874 (13 Stats. at Large, 356); the powers given and the duties imposed by those acts in respect to bridges, were recognized, increased, and regulated, but not repealed, by the special act of February 24th, 1871, entitled "An act to authorize the Union Pacific Railroad Company to issue its bonds to construct a bridge across the Missouri river at Omaha, Nebraska, and Council Bluffs, Iowa." (16 Stats. at Large, 430.)
3. This last named act, construed in connection with the other legislation of congress, was held not to change the eastern terminus of the Iowa branch of the Union Pacific Railroad Company from the Iowa

United States v. Union Pacific Railroad Company.

shore of the Missouri river, nor to disconnect the bridge from the road of the company, so as to relieve the company from the duty imposed by its charter and other acts of congress, to operate its whole railroad as "one continuous line."

4. A peremptory mandamus to compel the Union Pacific Railroad Company to operate its road over the bridge in the same general manner that it operates the other portions of road was granted, and the device of a separate transfer over the bridge by local trains held to be in violation of the duty of the company to the public.
5. Amendments in form and in substance may be allowed in mandamus proceedings, in any stage thereof where justice will be thereby promoted; in this case the alternative writ was amended, by leave of court, by striking out part of its mandate, and the peremptory writ, instead of being denied because the alternative writ was too broad, was ordered to be issued in conformity to the alternative writ as amended.

(Before DILLON and LOVE, JJ.)

*Eastern Terminus of the Union Pacific Railroad Company.—
Power of Company to Bridge the Missouri River.—Mandamus to Compel the Company to Operate its Whole Line.*

ON MOTION FOR A PEREMPTORY WRIT OF MANDAMUS. This is a proceeding by mandamus, to compel the Union Pacific Railroad Company to operate its road as a continuous line, by running its regular through trains to and from the Iowa shore of the Missouri river, at a point within the limits of Council Bluffs, in the state of Iowa, and which point the relators claim to be the eastern terminus of the road. On the other hand, the company insist that the eastern terminus, that is, the legal as well as actual terminus of the company's road proper, is on the western shore of the Missouri river, at a point within the corporate limits of the city of Omaha, in the state of Nebraska. Between the Iowa shore and the Nebraska shore the company has constructed a railway bridge, the eastern end of which and the approaches thereto are within the city of Council Bluffs, while the western end and the approaches thereto are within the limits of the city of Omaha. The western end of this bridge is near the passenger depot of the company in Omaha, and the rails of the company's road are extended or prolonged over the bridge, so that the company could,

United States v. Union Pacific Railroad Company.

if it desired, run its regular trains each way, without change, over the bridge. The bridge is located about two miles south of the point in section 10, township 15, range 13, known as the initial point of the actual construction, but the road between that point and the machine shops of the company in Omaha has been taken up and abandoned. The company, instead of running its regular trains to and from the Iowa side of the river, stops them at and starts them westward from Omaha, and it crosses passengers and freights over the bridge by means of separate and distinct trains, called "transfer trains," under the management of a "Bridge Transfer Company," an organization of its own employes, charging therefor special rates, viz., fifty cents for each passenger, and ten dollars for each car, and keeping a separate account of the earnings of the bridge. Through passengers and freights, each way, cross the bridge by the agency of this transfer company. Passengers from any of the Iowa roads terminating in Council Bluffs, or at or near the eastern end of the respondent's said bridge, intending to go west by the respondent's road, instead of getting directly on the regular train of the respondent, are required to get on a local or transfer train, and, on arriving at Omaha, to change to the regular train of the company, which is made up and operated from the company's depot in that place. And a like change is necessary to be made by passengers on the respondent's road arriving at Omaha from the west and going east.

The present proceeding is instituted by the relators under the act of congress of March 3, 1873 (17 Stats. at Large, 509, sec. 4, last clause), which provides that "the proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel said Union Pacific Railroad Company to operate its road as required by law."

The relators claim, under the various provisions of the acts of congress applicable to the respondent, that it is bound to operate its regular through trains over the bridge to and from the Iowa side, and that operating the bridge in the manner stated, through the agency of the transfer company, is in violation of the acts of

United States v. Union Pacific Railroad Company.

congress. Indeed, the relators claim that the bridge is, in fact, an integral part of the railroad of the company, and must be operated as such, and that the company has no legal right to exact or charge special rates or tolls for freights or passengers carried thereon.

The alternative writ of mandamus (upon which, and the return and answer thereto, relators now move for a peremptory writ), commanded "the Union Pacific Railroad Company to operate the whole of its railroad from Council Bluffs westward, including that portion of its road between Council Bluffs and Omaha, and constructed over and across the said bridge, as one continuous line, for all purposes of communication, trade, and transportation; and especially to start its regular through freight and passenger trains westward-bound from Council Bluffs, and to run its eastward-bound trains of both descriptions through and over the said bridge to Council Bluffs, and to operate its said trains to and from Council Bluffs under one uniform time schedule and freight and passenger tariff with the remainder of its said road, and to wholly desist and refrain from operating said last mentioned portion of said road as an independent and separate line, and from causing or requiring freight or passengers, bound westward or eastward, to be transferred as aforesaid at Omaha," or that the company appear, to show cause to the contrary. The company has appeared, and for cause shows substantially the facts herein stated.

The Union Pacific Railroad Company was chartered by congress July 1, 1862 (12 Stats. at Large, 489). The 1st, 7th, 8th, 9th, 12th, 13th, 14th, and 17th sections—and particularly the 12th and 14th—bear upon the present controversy. The act provided for a main trunk line to run westward from a point on the 100th meridian, at which point it was to connect with branch roads converging there: the northern one having its eastern terminus at Sioux City, Iowa; the southern, at the mouth of the Kansas river, on the south side thereof; and the central (the one here in question), "from a point (sec. 14) on the western boun-

United States v. Union Pacific Railroad Company.

dary of the state of Iowa, to be fixed by the president of the United States."

On the 17th day of November, 1863, President Lincoln, by an executive order, fixed "so much of the western boundary of the state of Iowa as lies between the north and south boundaries of the United States township within which the city of Omaha is situate, as the point from which said line of railroad shall be constructed." But this point is indefinite north and south, as the township was six miles in length, and on March 7, 1864, the same president, "on the application of the company," did "designate and establish such first above named point on the western boundary of the state of Iowa, east of and opposite to the east line of section 10, township 15, range 13, in the territory of Nebraska."

The legal western boundary of the state of Iowa is "the middle of the channel of the Missouri river." (9 Stats. at Large, 52.)

On the 2d of July, 1864 (13 Stats. at Large, 356), the charter of the company was materially amended, by giving to the company increased aid in lands and bonds, and by several specific provisions.

The original charter contained no express provisions as to bridges.

The amended charter (sec. 9) on the subject was as follows: "That, to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri river, and other rivers which its road may pass in its course, and authority is hereby given said corporation to construct bridges over said Missouri river and all other rivers, for the convenience of said road: *Provided*, that any bridge or bridges it may construct over the *Missouri river, or any other navigable stream on the line of said road*, shall be constructed with suitable and proper draws, etc., and shall be built, kept, and maintained at the expense of said company, in such manner as not to impair the usefulness of said rivers for navigation."

The company commenced in 1869 the construction of the

United States v. Union Pacific Railroad Company.

bridge here in question at the point where it now is, but before it was completed, congress passed an act, approved February 24, 1871, having a material bearing upon the present controversy. (16 Stats. at Large, 430.) This enactment is as follows:

"AN ACT to authorize the Union Pacific Railroad Company to issue bonds and construct a bridge across the Missouri river at Omaha, Nebraska, and Council Bluffs, Iowa.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

"That, for the purpose of more perfect connection of any railroads that are, or shall be, constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and is hereby, authorized to issue bonds and secure the same by mortgage on the bridge and approaches, as it may deem needful, to construct and maintain its bridge over said river, and tracks and depots required to perfect the same, as now authorized by law of congress; and said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges for the use of the same; and for the use and protection of said bridge and property, the Union Pacific Railroad Company shall be empowered, governed, and limited by the provisions of the act entitled 'An act to authorize the construction of certain bridges, and to establish them as post roads,' approved July 25, 1866, so far as the same is applicable thereto: *And provided*, that nothing in this act shall be so construed as to change the terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligations as established by existing laws: *Provided, also*, that congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall

United States v. Union Pacific Railroad Company.

not exceed two and a half millions of dollars: *Provided*, that if said bridge shall be constructed as a draw-bridge, the same shall be constructed with spans not less than two hundred feet in length in the clear, on each side of the central or pivot pier of the draw."

Under the authority thus conferred to mortgage the bridge, the company, April 1, 1871, mortgaged the same, and its tolls and income, to secure bonds to the amount of \$2,500,000 in gold, which bonds are now outstanding. But before the said bridge was commenced, viz., November 1, 1865, the company, under authority given by the 10th section of the act of July 2, 1864, had mortgaged to trustees "all and singular the railroad and telegraph of said company heretofore constructed or hereafter to be constructed on a point on the western boundary of the state of Iowa, heretofore fixed by the president of the United States, to-wit, at the city of Omaha," etc., with all lands, rights of way, easements, depot buildings, and franchises for building and operating the said road, etc., etc., to secure the first mortgage bonds, of which \$27,000,000 are alleged to be outstanding, and the government has a subordinate lien for many millions of dollars to secure the repayment of the bonds it issued to the company.

The 12th section of the original charter of the company contained, *inter alia*, this provision: "The whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line."

The 15th section of the amended charter of 1864 contained the provision: The several companies, for the purposes of communication, travel, and transportation, so far as the public and the government are concerned, shall operate and use said roads as one continuous line, and in such operation and use to afford and secure each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road and business of any or either of said

United States v. Union Pacific Railroad Company.

companies, or adverse to the road or business of either of the others.

As late as the 20th day of June, 1874, by an act entitled "An act making additions to the 15th section of the act approved July 2, 1864" (the amendatory act of 1864 above referred to, Stats. 1873-4, 118), the said 15th section is amended by the addition thereto of the following:

"And any officer or agent of the companies authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph under his control, or which he is engaged in operating, for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line, or shall refuse in such operation and use to afford and secure to each of said roads equal advantages and facilities as to rates, time, or transportation, without any discrimination of any kind in favor of or adverse to the road or business of any or either of said companies, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding \$1,000, and may be imprisoned not less than six months."

Further provisions are made for suit by the party aggrieved (prescribing the courts in which suit may be brought, and the mode of service therein), "in case of failure or refusal of the Union Pacific Railroad Company, or either of said branches, to comply with the requirements of this act, and the acts to which this act is amendatory."

On other questions this proceeding has already been several times before the court. (2 Dillon, 527; 3 *Ib.* 515.)

A return has been made to the alternative writ, and an answer thereto been filed, and the case is now before the court on the motion of the relators for a peremptory mandamus.

John N. Rogers, for the relators.

J. M. Woolworth and *A. J. Poppleton*, for the railroad company.

United States v. Union Pacific Railroad Company.

DILLON, *Circuit Judge*.—In a controversy which has excited intense local feeling, and one involving such large interests, and to which so much attention has been drawn on the part of the public and of congress, and which has been so fully argued at the bar, the court would be justified in stating with more than usual fullness the grounds of its judgment, but as its determination is not final, and as it is understood that the unsuccessful party, whichever it may be, will carry the order here made for revision to the supreme court, it is not our purpose to discuss the case with that degree of elaboration we should otherwise do, and which its intrinsic importance would well warrant.

We now proceed to notice the material questions involved in the application for the peremptory writ.

If the road which the respondent is bound to operate, has its terminus on the western shore of the Missouri river, as its counsel have contended—in other words, if, under the acts of congress applicable to the respondent, it was not authorized to build the road it is required to operate, to the Iowa shore of the river—it may be conceded that the result would be that the relators would not be entitled to the writ they seek.

What point, therefore, does the charter of the company fix as the commencement of what is therein termed the “Iowa branch?” This question is answered by the following language in the act of 1862: “The said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the state of Iowa, to be fixed by the president of the United States.”

In the executive orders of November 17, 1863, and March 4, 1864, President Lincoln did not undertake to change this provision, but carefully conformed to it. Accordingly, those orders named “the western boundary of the state of Iowa” as “the point from which the company should construct their branch road to the 100th meridian.” Indisputably, then, the commencement point of the Iowa branch is on “the western boundary of the state of Iowa.” This precise language as descriptive of “the point of commencement,” is twice used in the section (14) which provides

United States v. Union Pacific Railroad Company.

for the building of the branch, and prescribes its commencement, course, and termination. Indeed, counsel for the company do not deny, in argument, that the commencement point of the road, as prescribed by the terms of the charter, is upon the western boundary of Iowa, but they raise a question as to what is the western boundary of that state, and deny that this language means the eastern shore of the river. The argument of the company's counsel on the subject can best be presented in his own language. He says: "The western boundary of the state of Iowa is in the middle of the Missouri river. (9 Stats. at Large, 52.) The road is to be constructed, then, from a point, to be fixed by the president, in the middle of the main channel of the river. But it is said that is impracticable, and you must put your initial point on the Iowa shore, or a part of the authorized road cannot be built. But there is this rule, that a grant of this kind is to be strictly construed. You cannot go beyond the limits fixed, and if you cannot go to the limits fixed, you must go as near them as you can, always keeping within them. If it is impracticable to begin the road in the middle of the river, you must begin on the Nebraska shore."

If it be granted that congress, by the use of the words "point on the western boundary of the state of Iowa as descriptive of the 'point of commencement' of the 'Iowa branch,'" meant to refer to the *legal boundary* of the state as declared in 1846 (9 Stats. at Large, 52), the views of counsel would be sound. And if there is nothing to show that congress meant some other than the legal boundary, there would be a strong presumption that the legal boundary was the one here intended.

There is, however, in various provisions of the charter of the company, evidence of a very satisfactory character that congress, in the language under consideration, referred to the boundary of the state on the river rather than on the ideal line in the middle of its channel. It had no question of territorial jurisdiction before it, and hence its attention was, probably, not drawn to the act of 1846, fixing the legal boundary. Congress, in the charters of the Union Pacific Company, as respects *all* of the branches,

United States v. Union Pacific Railroad Company.

decisively meant to secure a close and immediate connection with the Iowa and Missouri railroads—leaving no *hiatus* or break in the line. What reason is there, then, for supposing that the central Iowa branch was intended to be exceptional in this respect? The Iowa lines of railway had not then been completed to the Missouri river, and hence could not be mentioned by name, but it is not readily to be supposed that congress, in granting the powers and furnishing the means to construct a great national highway, intended to make no provision for crossing a broad and swift stream like the Missouri, known to be at the western end of the Iowa roads, whose completion so as to connect with the Union Pacific road was then contemplated and relied on. Therefore, when the original charter of the company authorized and required it to construct its railway from a point on the western boundary of the state of Iowa, it authorized its construction from the Iowa shore, and if a bridge was necessary to meet the requirement, then the power to build the bridge was given. (*Springfield, etc. Railroad Company*, 4 Cush. 63; *City of Clinton v. Cedar Rapids Railroad Company*, 24 Iowa, 455, 479; *People v. R. & I. Railroad Company*, 15 Wend. 113, 130.)

Indeed, it might well be urged that not only was authority conferred to build the bridge, but that the duty was imposed to build it as a part of its "line of railroad" necessary to reach the prescribed point of commencement. The company did not need, so far as relates to bridges, the power given to it by the 9th section of the amended charter (1864), "to establish ferries across the Missouri river, and other rivers which its road may pass in its course," and "to construct bridges over said Missouri river, and all other rivers, for the convenience of its road," and "to enable it to make convenient and necessary connections with other roads."

A bridge built under authority of the acts of 1862 or 1864, would be part of the road of the company; or, in the language of the original charter (section 14), part of its "line of railroad constructed from a point on the western boundary of the state

United States v. Union Pacific Railroad Company.

of Iowa;" just as a bridge in a highway has often been held to be part of the highway itself. (Dillon on Munic. Corp. sec. 579.) If there was doubt as to the right of the company to pass beyond the middle of the river, and go to the Iowa shore, under the original charter of 1862, that doubt is set at rest by the aforementioned 9th section of the amended charter of 1864, which, in terms, authorizes the company to construct a bridge over the Missouri river, which presupposes that the eastern end of it shall rest upon the Iowa shore; and this is done, so congress declares, "to enable the Union Pacific Railway to make convenient and necessary connections with other roads." The bridge was to be built by the Union Pacific Railroad Company. No provision was made for a bridge company, or for stock or capital for bridge purposes, and if the structure had been built under authority thus conferred, and no other, there could be no doubt that it would have been a part of the road of the company in such a sense that the company would have been bound to operate it, as much as it was bound to operate any other part of its line.

It appears, from the return to the alternative writ, that the company, under the authority thus given, and not otherwise, commenced the construction of the bridge here in question in 1869. It proved to be a difficult and expensive undertaking, and in 1871 the structure was far from being completed. On the 24th day of February, of that year, congress passed "An act to authorize the Union Pacific Railway Company to issue its bonds to construct a bridge across the Missouri river at Omaha, Nebraska, and Council Bluffs, Iowa." (16 Stats. at Large, 430.) This enactment is supposed by the defendant to have a controlling effect on the present controversy; and it undoubtedly has an important bearing upon it. It is given in full in the statement of the case. It authorizes the Union Pacific Railroad Company "to make a mortgage on the bridge and approaches and appurtenances," and to issue bonds not to exceed \$2,500,000, to be secured by such mortgage.

Notwithstanding the rule of law that authority to levy and

United States v. Union Pacific Railroad Company.

collect tolls must be plainly conferred, and the able argument of the relators' counsel on this point, it is clear to our minds that congress gave, by this act, to the company the right to "levy and collect tolls and charges for the use of the bridge," reserving, in the second proviso, the "power at all times to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinafter provided for."

It is manifest, from this language, that tolls and charges, other than those for local travel, were contemplated as being within the competency of the company to levy and collect for the use of the bridge. Besides, the chief value of the bridge as a security would be the tolls, and the authority to make a mortgage for \$2,500,000 on the mere bridge structure and approaches, without the right to levy tolls, and pledge the same to the lender, would, doubtless, have proved a barren power, since it would be quite impossible to negotiate such a security. It is evident, from the tenor of the bridge mortgage, that all the parties to that instrument thus understood the act of 1871.

The act contains, also, the important provision that it shall not "change the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under the existing laws, nor release said company from its obligations under existing laws." It also contains a clause adopting, as far as applicable to the bridge in question, the provisions of the bridge act, July 25th, 1866 (15 Stats. at Large, 254).

The act also contains a clause authorizing the bridge to be "so constructed as to provide for the passage of ordinary vehicles," but the privilege was not used, and so need not be considered.

The bridge act of 1871, it is to be observed, does not profess to repeal the previous authority, express or implied, on the part of the company to bridge the Missouri river, but only to confer additional powers and make additional provisions. All the provisions of the several acts are to be read together; and thus viewed the respondent would have, *inter alia*, the following rights and powers in respect to the bridge in question :

United States v. Union Pacific Railroad Company.

1. To build it under the original and amended charter as part of its road, and from a point on the Iowa shore.

2. Under the act of 1871 it was so far disconnected from the road as to authorize it to be separately mortgaged as a bridge, and this act empowered the company to levy and collect tolls and charges for the use of the same as a bridge, or compensation for the use of it, by other railroads constructed to the Missouri river at or near Council Bluffs and Omaha, congress reserving the power to regulate the bridge and the rates for transportation of freight and passengers over the same. But it was expressly provided that this act should not change the then existing eastern terminus of the company's road, nor release the company from its obligations under existing laws. By this last provision it was doubtless intended to declare that the eastern terminus of the road should remain where it had before been established, and then existed, namely, on the Iowa shore, and the existing obligations of the company springing from that fact should remain in full force. One of these obligations is that while the bridge mortgage remains unforclosed, and the bridge is in possession of the company, the company must operate it as part of its road, which it has never ceased to be, although it may, under the act of 1871, charge special rates for its use, subject to the control of congress.

Three several times, first in the act of 1862 (section 12), then in the act of 1864 (section 15), and lastly, as late as June 20, 1874, has congress required the respondent "to operate and use its road for all purposes of communication, travel, and transportation, so far as the public and government are concerned," as one continuous line. This last act even goes so far as to make it criminal on the part of the controlling officers or agents of the companies, or either of the companies, to refuse thus to operate the roads or either of them—thus demonstrating that congress intended that each road, singly, as well as all the roads constituting part of the system of Pacific roads contemplated by the acts of 1862 and 1864, should be operated without breaks or unnecessary delay, as a continuous line, without favor or discrimination towards either persons or localities.

United States v. Union Pacific Railroad Company.

If we are right in the position that the eastern terminus of the road of the respondent is on the Iowa shore, then, inasmuch as the bridge act of 1871, upon which the respondent so strongly relies, declares that such terminus remains unchanged, notwithstanding that act, the conclusion necessarily follows that the respondent must operate its trains over the bridge under its control as part of a continuous line of road, and operate them over its entire line of road from terminus to terminus. Such a duty has been enforced by a mandamus without such specific legislation as congress has provided in this behalf by the act of March 3, 1873 (17 Stats. at Large, 509, sec. 4, last clause), which, in terms, gives "to the proper circuit court of the United States jurisdiction to hear and determine all cases of mandamus, to compel the Union Pacific Railroad Company to operate its road as required by law." (*The State v. Hartford, etc. Railroad Company*, 29 Conn. 538; *Rex v. Severn and Wye Railway Company*, 2 Barn. & Ald. 646.) .

Suppose the respondent should habitually stop its regular trains two miles west of Omaha and refuse to run them eastward of that point, or only run "transfer trains," is there any doubt, under the legislation of congress, that it could be compelled to operate and run its regular trains into that city? And so in the case before us, if the bridge on which its track is extended is to be considered as part of its road, within the meaning of the acts of congress requiring it to operate its whole line without any break in its continuity. In this view the transfer device of the company, putting passengers and shippers of freight to unnecessary delay, inconvenience and expense, is in violation of the duty which the company owes to the public. If made by the company with third persons, without legislative authority, it would be *ultra vires*. It is none the less objectionable that it is made by its own employees.

A point is made by the respondent against the writ on the ground that the bridge structure is not opposite section 10, as fixed by the president, but some two miles down the river. In point of fact, after getting bonds and lands by reason of that

United States v. Union Pacific Railroad Company.

location, the company has abandoned the track through section 10, and instead of crossing the river opposite that section, has constructed its road so as to connect with the present bridge. If this change in the location of the bridge from section 10 was authorized as an implied effect of the act of 1871, applied to the subject matter, the objection under consideration fails. Originally, under the order of President Lincoln, the bridge should have been constructed so as to reach the Iowa shore east of and opposite section 10. Instead of this, the company commenced a bridge at the site of the present bridge, two miles south. Congress, in 1871, authorized that bridge to be completed and mortgaged, thereby legalizing the change, and doubtless relieving the company of the duty of bridging the stream opposite section 10. And, therefore, when congress also said that the act of 1871, in relation to the bridge, should not "change the eastern terminus of the road from the place where it is now fixed under the existing laws," it did not mean that the company should still be under an obligation to build a bridge opposite section 10, but that the Iowa shore should, notwithstanding the bridge act, remain the eastern terminus of the road, and the company's obligation in this regard should continue. But if the change in the location of the bridge was not authorized by the act of 1871, still the company ought to be estopped to say we have reached our eastern terminus at the wrong place, and hence cannot be compelled to operate the whole length of our actual line of road.

Again, it is suggested by the respondent's counsel that this view, if sound, necessarily has the effect to subordinate the bridge mortgage for \$2,500,000, which was intended to be a first lien upon the bridge as well as its tolls, to the prior mortgage of the company upon its entire line of road.

These respective mortgagees are not before us, and their rights cannot be touched by anything here decided. We content ourselves, therefore, with the remark that, observing the terms of the two instruments, we do not see that the result suggested necessarily follows from the positions we have attempted to main-

United States v. Union Pacific Railroad Company.

tain. It were premature at this time to anticipate that there will be a sale under the bridge mortgage, and to consider the rights of the purchaser, of the company, of the public, or of the government after that event.

Two technical points are made by the respondent. The first is that no demand is averred. Under the circumstances of this case, this objection, being made at the hearing on the merits, and the duty being a public one, which the respondent has all the time denied to exist, comes too late.

The object of a demand is to give the option to do or refuse that which is demanded, and it is evident that a demand by the relators would not have obviated the necessity for this proceeding to determine the contested question of public right and duty here involved. (Dillon on Munic. Corp. sec. 696.)

The other point is more substantial, and, indeed, fatal, to the application in its present form for the peremptory writ, unless the objection can be avoided by amendment. The proceedings by mandamus at common law are characterized by unreasonable strictness; and an established rule of practice in the queen's bench is that the mandate of the peremptory writ cannot be moulded by the court after hearing upon the return of the alternative writ, but the peremptory writ must be denied altogether unless the sphere of its mandate is exactly coincident to the mandate of the alternative writ. (*Queen v. East, etc. Railroad Company*, 2 El. & Bl. 446; 3 Ad. & Ell. 534; 14 *Ib.* N. S. 59.)

If the propositions heretofore advanced are correct, the mandate of the alternative writ was too broad in that it commanded the defendant to operate the bridge under a uniform tariff of freights and fares with the residue of the road.

We hold that the defendant may, under the act of 1874, exact special tolls and charges for the use of its bridge. Anticipating that this might be the view of the court, the relators' counsel have, in that event, asked leave to amend by striking out of the mandate of the alternative writ the words, "and freight and passenger tariff," and that the peremptory writ issue so as to con-

United States v. Union Pacific Railroad Company.

form to the alternative writ as thus amended. Undoubtedly this amendment ought to be allowed. In this country, and at this day, the writ of mandamus has lost its prerogative character, and the proceedings are governed by the same liberal rules which obtain in ordinary legal remedies. According to Chief Justice TANEY, "the right to the writ, and the power to issue it, have ceased to depend on any prerogative powers, and it is now regarded as an ordinary process in the case to which it is applicable. It is a writ to which every one is entitled, when it is the appropriate process for asserting the right he claims." (*Kentucky v. Dennison*, 24 How. 66.)

In our judgment, the true rule is to allow, on proper terms, amendments in proceedings by mandamus at all times, both as to form and substance, in the interests of justice. In England, 9 Anne, chapter 20, section 7, extended the statutes of *jeofails* "to all writs of mandamus, and all the proceedings thereon." Speaking of the power to allow amendments, Mr. Justice STRONG, delivering the judgment of the supreme court of Pennsylvania, remarks: "Formerly, when the doctrine of amendments remained as at common law, the court would not allow the writ of mandamus to be amended after return filed; but, as is said (Tapping, p. 334), the strict rule of the common law has been, of late years, altogether departed from, the principle as to amendment being that it shall be allowed in all cases, when such a course will promote justice." (*Commonwealth v. Pittsburgh*, 34 Pa. St. 499, 515.) And such is unquestionably the American practice. (Dillon on Munic. Corp. sections 699, 701, and cases cited; High on Extr. Rem. 519.) And the allowance of such amendments is within the spirit, if not, indeed, within the terms, of the liberal provisions as to amendments in the 32d section of the judiciary act. The power there given to allow amendment is broad, extending to "any defect," and should not, ordinarily, be confined to defects of form, and should be liberally viewed, and the power given liberally exercised to promote justice.

Guided by these considerations, why should the relators be

Union Pacific Railroad Company v. Pottawattamie County.

denied the power to amend to conform to the views of the court, and compelled to commence anew. The defendant, it is to be supposed, has and feels no other interest in this controversy than to have its public duty authoritatively settled, and this can be as well done in this proceeding by allowing the amendment, as by forcing the relators to retrace all their steps, by commencing *de novo*.

Let an order be entered allowing the proposed amendment to the alternative writ, and thereupon directing the peremptory writ to issue, conformed to the alternative writ as amended.

LOVE, J., concurs.

ORDERED ACCORDINGLY.

NOTE.—The judgment in this case was affirmed by the supreme court at the October term, 1875 (1 Otto, 343).

Growing out of the preceding case was the following, decided in the Iowa circuit at the May term, 1877:

THE UNION PACIFIC RAILROAD COMPANY v. THE COUNTY OF POTTAWATTAMIE and THOMAS BOWMAN, Treasurer.

Under the revenue laws of Iowa (Code of 1873, secs. 808, 810), that portion of the bridge of the Union Pacific Railroad Company over the Missouri river, between Council Bluffs, Iowa, and Omaha, Nebraska, which lies within the limits of Iowa, may be taxed as a bridge, and not necessarily as a part of the road of the company; and this mode of taxation is not inconsistent with the decision of the supreme court in *The Union Pacific Railroad Company v. Hall*, 91 U. S. R. (1 Otto) 348.

(Before DILLON and LOVE, JJ.)

Taxation of the Missouri River Bridge of the Union Pacific Railroad Company by State Authority.

This suit is brought to restrain the collection of the state, county, and school taxes levied in Iowa for the year 1875, on that portion of the property of the Union Pacific Railroad Company commonly known as its Missouri river bridge.

The city assessor of the city of Council Bluffs, in the year 1875, assuming that that portion of the Union Pacific Railroad extending over the Missouri river into the state of Iowa constituted a portion of a railway bridge across said river, proceeded to assess it under the provisions of sections 808 and 810 of the Code of 1873, as follows, viz.:

"The east one-half of the Union Pacific Railroad bridge across the Missouri river, valued at \$350,000, and a strip of land two hundred feet wide, commencing at the west line of section 34, in township 15, and

Union Pacific Railroad Company v. Pottawattamie County.

range 44, and running on or near the middle of sections 34 and 33 to the Missouri river, inclosing and including the approaches thereto, valued at \$50,000."

Afterward, said assessment, at the instance of the complainant, was modified by the board of equalization to the following: "The east one-half of the Union Pacific Railroad bridge across the Missouri river, valued at \$350,000." It will thus be seen that the assessment was made by the local assessor, and modified by the board of supervisors sitting as a county board of equalization, neither of which, the complainant claims, had any jurisdiction to assess said property.

The amount and denomination of tax levied by the board of supervisors upon such valuation and assessment are as follows:

State	\$ 785 68
County	1,471 36
School	367 84
Court-house.....	651 76
Bonds.....	785 68
Bonds, Mississippi and Missouri.....	367 84
Insane.....	91 96
Poor.....	367 84
Judgment.....	91 96
Independent school district of Council Bluffs.....	2,942 72
City of Council Bluffs.....	3,678 40
Total	\$11,403 04

Of these, the state, school, independent school district of Council Bluffs, and city of Council Bluffs taxes, being an aggregate of \$7,724.64, or about two-thirds of the entire amount, will be paid over by the collector to the different officers authorized to receive them as required by law.

The bill of complaint for an injunction sets out, *inter alia*, these facts, and claims that the bridge in question can only be taxed as an integral portion of the Union Pacific Railroad, and that, under the revenue laws of Iowa, it is beyond the jurisdiction of the local assessor, and that the assessment was not made in the manner nor upon the principles required by those laws. An answer and replication have been filed, and the facts agreed upon by the counsel, and the cause is before the court on final hearing.

A. J. Poppleton, for the complainant.

James T. Lane, Abner Davison, and B. W. Hight, for the defendants.

DILLON, *Circuit Judge*.—Passing the question whether the bill states a case for an injunction within the principles on this subject laid down by the supreme court in the Illinois tax cases (92 U. S. R. 575), and the question whether the complainant, if right in the views on which the bill is based, has not a complete remedy at law, the fundamental question is,

Union Pacific Railroad Company v. Pottawattamie County.

whether, under the revenue laws of Iowa, the authorities of the state can lawfully tax the portion of the complainant's bridge over the Missouri river situate within the state of Iowa separately as a bridge, or whether it must be taxed as a portion of the road of the complainant, the same as any other like length of its line. The latter view is asserted by the complainant, the former by the defendants. The character of this bridge, the authority to build it, and the duty to operate it, fully appear in the case of *The Union Pacific Railroad Company v. Hall*, 91 U. S. R. (1 Otto) 343. It was there held that this bridge, as respects the duty of the complainant company to use and operate it, was an integral part of its line of road. The bill in this case is based upon the view that if this bridge is part of the road, then it must be taxed as a part of the road, and not separately as a bridge. Whether this view is sound, is really the important question in the cause upon the merits.

It is to be borne in mind, that the case referred to related to the duty of the company, under the acts of congress, to operate its whole line of railway from and to its initial point in Iowa; while this case relates to the power of the state to tax the bridge, or rather to the mode of exercising that power. It might well be that the bridge is part of the road as respects the duty of continuous operation under the acts of congress, and yet, for other purposes, as, for example, the security of bridge bondholders under the act of congress of February 24th, 1871, or for purposes of taxation under the revenue laws of the state, it might be regarded as a bridge.

The power of the state to tax the property in question, is settled by the case of *The Union Pacific Railroad Company v. Peniston* (18 Wall. 5), and is not disputed by the complainant's counsel. Unless the provisions of the Iowa statute for the taxation violate some prohibition of the state constitution or some right given to the company by the legislation of congress in its behalf, they must be sustained. The state could, undoubtedly, provide for taxing the bridge in question as part of the road of the company, valuing it no higher than other portions of the road, and distributing the taxes as it might see fit; or, in its discretion, it might provide for a separate valuation, assessment, and taxation of the bridge, if it thereby violated no paramount right of the company.

Now, what has the state done? If we look into its legislation on this subject, it seems to be uniform and unambiguous.

By the act of April 12, 1870 (Laws 13th Gen. Ass. chap. 106, p. 109), railway companies, upon their railway property proper, were taxed exclusively in respect of their gross earnings; but as to their other property, the taxation was local, the same as the property of individuals (sec. 5). As to bridges, there was this special provision: "Sec. 6. No provision of this act shall be held to apply to any railroad bridge across the Mississippi or Missouri rivers, but such bridges shall be assessed and taxed on the same basis as the property of individuals."

Union Pacific Railroad Company v. Pottawattamie County.

By the act of April 6th, 1872 (chap. 26, Laws 14th Gen. Ass. p. 29), the mode of taxation was changed, and taxation upon valuation instead of gross receipts was adopted.

This act substitutes the census board for the state treasurer in receiving the sworn statement of the railroad companies, and requires said board to make a valuation of all the property of railroad companies, except lands, lots, and other real estate not exclusively used in the operation of the roads, and *excepting railroad bridges across the Mississippi and Missouri rivers*, and to transmit to the board of supervisors of each county through which the road runs, a statement showing the length of main track within said county, and the assessed value per mile, which shall constitute the taxable value of said property for all taxable purposes.

The 3d section declares that this "assessment shall be made upon the entire road within the state, and shall include the right of way, the road-bed, *bridges*, culverts, rolling stock, depots, station grounds, shops, buildings, gravel-beds, and all other property, real and personal, exclusively used in the operation of such railroad."

But section 10 *declares that no provision of this act shall apply to any bridge across the Mississippi or Missouri rivers*—the same terms, precisely, as are contained in section 6 of the first act of 1870, and affirmatively provides that such bridges shall be assessed and taxed on the same basis as the property of individuals.

The act of 1872 is substantially embodied in the Code of 1873—sections 808, 810, 1317, 1322—in force when the tax in question was levied. Section 808 of the Code of 1873 is as follows: "Lands, lots, and other real estate belonging to any railway company, not exclusively used in the operation of the several roads, and all railway bridges across the Mississippi and Missouri rivers, shall be subject to assessment and taxation on the same basis as the property of individuals in the several counties where situated."

Section 810: "All railway property not specified in section 808 of this chapter, shall be assessed upon the assessment made by the executive council, as provided in chapter 5 of title 10, at the same rates, by the same officers, and for the same purposes as individual property under the provisions of this chapter; and all provisions of this title relating to the levy and collection of taxes, shall apply to the taxes so levied upon railway property."

It thus appears that, from the year 1870, the legislature of Iowa has made special provision for the taxation of "all railway bridges across the Mississippi and Missouri rivers"—these, whether owned by a separate company, as in the *Dunleith and Dubuque Bridge Company v. Dubuque*, 32 Iowa, 427, or by a railway company, as in *City of Davenport v. Chicago, Rock Island, and Pacific Railroad Company*, 38 Iowa, 633, being, under the legislation of the state, subject to municipal taxation as respects the portions thereof within the municipality.

In re Israel.

The taxes here in question were assessed in conformity with this view of the legislation of the state, and are valid unless this legislation conflicts with the constitution of the state, which is not claimed, or unless it is inconsistent with the acts of congress in respect to the complainant.

Where is the inconsistency? Congress has not spoken in respect to the extent or mode of taxation of this property by the states. I am unable to perceive that, because the supreme court has declared it to be the duty of the company to operate its whole line, including this bridge as part of it, that it necessarily follows that, for the purposes of *taxation*, the bridge cannot be separately valued and assessed.

Nor is this result inequitable or unjust to the company. Equality of burden is the *desideratum* of all just revenue laws; and the *value* of the property to be taxed (having reference to its uses and earnings), ought not to be overlooked in the legislative endeavor to meet this *desideratum*. Take the legislative history of this bridge. The company had authority to build it under its general charter. But the structure proved to be very expensive. Congress was applied to by the company to authorize the bridge to be separately mortgaged for \$2,500,000, to raise the means to build it, and to levy and collect special rates and tolls upon freights and passengers crossing the bridge (13 Stats. at Large, 430). This mortgage has been executed, and special tolls, much larger than the general rates of the company for the use of its road, are exacted for the use of the bridge. It is thus seen that, as respects the structure in question, complainant has and enjoys the substantial franchise of a bridge company. There is, therefore, no inherent inequity in taxing the bridge as a bridge, and not as a mile, more or less, of railway, overlooking the cost, value, and authorized uses of the structure. It is my judgment that the bill be dismissed. Let a decree be entered accordingly.

Love, J., concurs.

BILL DISMISSED.

NOTE.—An appeal was prayed and allowed.

In re ISRAEL.

1. Section 23 of the original bankrupt act (section 5088 of the Revised Statutes), in relation to the surrender of fraudulent preferences, is not repealed by the 12th section of the amended bankrupt act of June 22, 1874, amending section 39 of the original bankrupt act, nor section 5021 of the Revised Statutes.
2. A creditor who, before presenting his claim for allowance in bankruptcy, and against whom no action has been brought by the assignee to defeat the preference, surrenders his preference under section 23, may prove his *whole debt*, and not simply a moiety of it.

In re Israel.

*(Before DILLON, Circuit Judge.)**Bankrupt Act.—Surrender of Fraudulent Preference.—Proof of Debt.*

APPEAL FROM THE DISTRICT COURT. In bankruptcy. Irwin, Phillips, & Co. presented a claim for allowance against the bankrupt's estate. The assignee filed objections, on the ground that they had received and accepted from the bankrupt a chattel mortgage with intent to obtain preference and defeat the operation of the bankrupt act. To these objections the claimants answered to the effect that before they presented their claim for allowance in bankruptcy, they had fully surrendered their preference to the assignee. Demurrer by the assignee, on the ground that the surrender could not entitle the claimants to prove more than a *moiety* of their debt. Demurrer overruled by the district court, which held that the effect of the surrender was to entitle the claimants to prove their *whole* debt.

The assignee appealed from the decision of the district court.

Messrs. Howell & Anderson, for the assignee.

Mr. James Hageman, for the claimants.

DILLON, *Circuit Judge*.—The question in this case is whether the creditors were entitled to prove the whole or only a moiety of their debt. They had surrendered their preference, without suit, to the assignee, before they presented their claim for allowance in bankruptcy. After a careful consideration of the 23d and 39th sections of the original bankrupt act, in connection with the amendment to the 39th section by the act of June 22, 1874 (section 12), my opinion is that the 23d section remains unrepealed by the amendment, and that if a preference be duly surrendered, as in this case, the surrendering creditor, whether his preference was an actual or only a constructive fraud upon the act, is thereupon entitled to prove his whole debt. It is not necessary to consider, on this appeal, what is a case of "actual fraud" within the meaning of the proviso to the 12th section of

 Burnham v. Chicago, etc., Railroad Company.

the amendment, for the reason that the amendment has no application to any case where the creditor has, before suit brought against him by the assignee, under section 39, made a full surrender of his preference. The opinion of the district judge, sent up with the record, as to the purpose and scope of the amendment of June 22, 1874, and the effect of the 12th section of that amendment on the law as it then stood, is so satisfactory on the question here involved, that it is not deemed necessary further to enlarge upon the subject.

AFFIRMED.

NOTE.—See same case, 3 Dillon, 511.

JOSEPH A. BURNHAM and JAMES BLAKE, Trustees, etc., v.
CHICAGO, DUBUQUE, AND MINNESOTA RAILROAD COM-
PANY *et al.*

A foreclosure suit by trustees in a railway mortgage, who are citizens of *Massachusetts*, was commenced in one of the state courts in Iowa against the debtor company, which is an *Iowa* corporation, making an *Illinois* and an *Indiana* corporation, each of which claimed liens upon the property, also defendants to the bill. This suit, after all of the defendants had answered, was removed, in 1876, to the circuit court of the United States for the district of Iowa, upon petition of the *plaintiffs*, under the act of 1867 (Rev. Stats. sec. 639, sub-division 3); the debtor corporation moved to remand the same to the state court, because *all* of the defendants were not citizens of the state in which the suit was brought: *Held*, inasmuch as the case was one clearly within section 2 of the act of March 3, 1875, in respect of removals, and the controversy one in relation to the priority of liens between citizens of different states, that the circuit court had jurisdiction, and that it should not be remanded.

(Before MILLER and DILLON, JJ.)

Removal of Suits.—Local Prejudice and Influence Act.—Revised Statutes, Section 639, Sub-division 3.—Act of March 3, 1875.—Remanding Suit.

THE *plaintiffs*, citizens of *Massachusetts*, are trustees in an ordinary railway mortgage, executed by the defendant, the Chi-

Burnham v. Chicago, etc., Railroad Company.

cago, Dubuque, and Minnesota Railroad Company, an *Iowa* corporation, and brought this bill in the *state* court (circuit court of Dubuque county), to foreclose the mortgage. The bill is in the usual form. It makes defendants thereto the said debtor railroad company, above named, and also the Haskell & Barker Car Company, an *Indiana* corporation, and the Chicago, Burlington, and Quincy Railroad Company, an *Illinois* corporation.

As against the Chicago, Dubuque, and Minnesota Railroad Company (the corporation debtor), the bill alleges the execution of the mortgage for \$4,425,000, default in payment of interest, and asks an account, the appointment of a receiver, and a decree of foreclosure.

In respect to the Haskell & Barker Car Company; the bill alleges that that company furnished, as it claims, certain rolling stock to the Chicago, Dubuque, and Minnesota Railroad Company to the amount of \$62,047.12, under an agreement by which the said car company claimed that it retained the title until payment, and it is alleged that it claims a lien on the said rolling stock, and to be first paid out of the proceeds of the sale. The plaintiffs ask "the court to inquire into this claim and to make such decree as equity requires."

In respect of the Chicago, Burlington, and Quincy Railroad Company, the bill alleges that it claims a lien for taxes paid on the property covered by the mortgage, for about \$10,000, and the sum of \$99,183 for labor and materials furnished in the construction of the road of the corporation debtor—the *Iowa* corporation. The bill prays "that the equities of the defendant's claims and liens may be determined, to the end that the purchasers under the decree may acquire an absolute title, and that a decree of foreclosure be entered."

This bill was filed in the state court, January 13, 1875—the court being then in session. On the same day the court appointed a receiver. At the same term (January term, 1875), the main debtor, the Chicago, Dubuque, and Minnesota Railroad Company, filed an answer, admitting the mortgage and default; that there is due the Haskell & Barker Car Company the sum of

Burnham v. Chicago, etc., Railroad Company.

\$56,443.13; and that the Chicago, Burlington, and Quincy Railroad Company paid the taxes, and furnished labor and materials, as alleged. The case went over to the next (April) term.

At the April term, 1875, one Rouse, a citizen of *Iowa*, applied, under the state code and practice, to intervene, and was allowed to do so, and he set up in his petition of intervention a mechanic's lien on the railroad sought to be foreclosed, for \$14,048.68, and asks the establishment of such lien, and that it be declared a first lien as against the plaintiffs.

At the same April term, an intervening petition was filed by one Callahan, a citizen of *Iowa*, stating that he had done a large amount of work for the railroad company, "or a construction company," held the note of the railroad company therefor, and asking an order that the receiver be directed to pay him.

At the same April term, the Iowa Pacific Railroad Company, an *Iowa* corporation, filed a petition of intervention, claiming a lien, asking to have a certain contract with the main defendant specifically executed and decreed to be a specific lien prior to the plaintiffs' mortgage. To this the *Chicago, Dubuque, and Minnesota Railroad Company* filed a demurrer.

At the same April term, 1875, the Chicago, Burlington, and Quincy Railroad Company, an *Illinois* corporation, filed a petition of intervention, claiming a first lien for the taxes and labor and materials mentioned in the plaintiffs' bill of complaint, and praying that it may be established and recognized in any decree of foreclosure that may be entered. On the 6th of September, 1875, this answer was amended. The case went over, at the April term, to the September term, 1875, no petition to remove the same having been made at the April term.

At the September term, 1875, the *plaintiffs* filed a petition to remove the cause into this court, under the act of March 3, 1875, on the ground that the various parties were citizens of different states. The state court ordered the removal. At the October term, 1875, of the United States circuit court for the district of Iowa, a copy of the record was filed therein, and, on motion of the corporation debtor (the railroad company), the cause was re-

Burnham v. Chicago, etc., Railroad Company.

manded to the state court, because the removal was *not in time* under the act of March 3, 1875, under which the removal was sought.

At the January term, 1876, of the state court, to which the cause had been remanded, the *plaintiffs* filed a petition and affidavit, to remove the cause under the act of March 2, 1867 (Rev. Stats. sec. 639, sub-division 3), and gave the proper surety, and the removal was ordered. The petition for removal states, *inter alia*, that "the said plaintiffs are citizens of Massachusetts, and the defendants and intervenors are all citizens of Iowa, except the Chicago, Burlington, and Quincy Railroad Company, which is a citizen of Illinois, and the Haskell & Barker Car Company, which is a citizen of Indiana." And now, at the May term of the circuit court, a motion to remand the cause is made by the corporation debtor. The main ground of the motion is that the cause is not removable under the said act, because *all* of the defendants are not citizens of the state in which the suit is brought—two of them, to-wit, the Haskell & Barker Car Company, and the Chicago, Burlington, and Quincy Railroad Company, being citizens of other states than the state of Iowa.

Mr. H. B. Fouke, for the motion.

Mr. James Grant and *Mr. George Crane*, *contra*.

Mr. Justice MILLER briefly stated his views, in substance, as follows: It is probable that, as the law stood prior to the passage of the act of March 3, 1875, the fair effect or construction of the *Sewing Machine Cases*, 18 Wall. 553, would require the circuit court to remand the case to the state court. In saying this, however, and in what I shall say of the effect of the act of 1875 on the question, it is to be borne in mind that I did not concur in the decision of the case in 18 Wallace, and have never believed it was sound law. How far this may affect my present opinion, I cannot say, though I commence with the conviction, or concession, that if the statutes had remained as they were when that case was decided, it would govern the present case. The case of the *Sewing Machine Company* was decided in the supreme court very largely on two propositions: First, that all

Burnham v. Chicago, etc., Railroad Company.

legislation prior to the act of 1866 had provided that the defendants alone could remove who had been sued where they did not reside; and, secondly, that all the defendants must have this capacity by being non-residents of the state where the suit was brought. And it was argued that the act of 1867, which extended the right of removal to both plaintiff and defendant, and removed the bar of time, save that it must be before final trial or hearing, still required that all the plaintiffs or all the defendants must be non-residents when the application for removal was made by either of these parties. And, because one of the defendants in that case was not a non-resident of Massachusetts, the application for removal by those who were, was held to be properly overruled.

Now, the whole theory of this case is overturned by the 2d section of the act of 1875. The distinction between the plaintiffs and defendants as to the right of removal is abolished, and either party may apply for the removal, if done before or at the first term at which the case was triable. It is obvious that this case was removable under the act of 1875, without the aid of the act of 1867, if the first application had been made at the April term, 1875. The last clause of the 2d section is also very significant, wherein it is declared "when the controversy is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove," etc. I understand this controversy to be one of priority lien between citizens of different states, and to come within this clause.

If, then, the generality of the language of the act of 1867 was limited by the construction given to the act of 1789 and subsequent statutes, such limitation ought to cease after the act of 1875, which gives the more enlarged right, which is in exact conformity to the spirit of the act of 1867.

DILLON and LOVE, JJ., concurred.

MOTION DENIED.

NOTE.—See *Arapahoe County v. Kansas Pacific Railway Company*, ante.

Thompson v. Scott.

THOMPSON, Receiver, v. SCOTT.

1. A person who brings an action in one court, against a receiver appointed by another court, without the consent of the court who appointed the receiver, is guilty of a contempt of the latter court; and this is so although such action may not result in disturbing the possession of the receiver. This doctrine applies with peculiar force to cases where suits are brought in the state courts against receivers appointed by the federal courts, in suits brought by citizens of other states to foreclose railway mortgages. The doctrine adopted by the supreme court of Iowa, in *Allen v. Central Railroad of Iowa*, 42 Iowa, 683, and by the supreme court of Wisconsin, in *Kinney v. Crocker*, 18 Wis. 75, denied.
2. In such cases, the proper practice is for the person having a demand against the funds in the hands of the receiver, to bring his demand into the court appointing the receiver, and the court will direct him to be examined, *pro interesse suo*, before the master, and if, upon auditing his claim, the court finds it to be a just one, it will direct the receiver to pay it without litigation, but if the court finds the claim to be a doubtful one, it will give the claimant leave to prosecute it before some competent court—consulting herein the convenience of parties and exercising a judicial discretion.

(Before LOVE, J.)

Actions Against Receivers.—Contempt.

THE case is fully stated in the opinion.

Grant & Smith, for the receiver.

L. O. Hatch, for the respondent.

LOVE, J.—The respondent is before the court by virtue of an order against him to show cause why he should not be attached for contempt. The alleged contempt is that, without obtaining leave, he commenced a suit in the circuit court of Clayton county, Iowa, against the complainant, a receiver appointed by this court.

The question before us to be decided is, whether or not a party may, of right, sue in a state court a receiver appointed by this court, without first coming here for leave to do so. The counsel

Thompson v. Scott.

for the respondent maintains the affirmative of this proposition, and rely upon the following authorities: *Page v. Smith*, 99 Mass. 395; *Kinney v. Crocker*, 18 Wis. 75; *Hill v. Parker*, 111 Mass. 508; *Camp v. Barnes*, 11 N. Y. 373; and especially upon the recent case of *Allen v. The Central Railroad of Iowa* (42 Iowa, 683), decided by the supreme court of Iowa.

The doctrine of the Wisconsin decision, quoted and approved by the supreme court of Iowa, in *Allen v. The Central Railroad of Iowa*, is expressed in these words: "There can be no room to question this conclusion, that in all cases where there is no attempt to interfere with actual possession of property, which the receiver holds under the order of a court of chancery, but only an attempt to obtain judgment at law, etc., it is not necessary to obtain leave of the court."

That this doctrine is, however, against the weight of authority in both England and America, is beyond doubt. Mr. High, the author of the work on Receivers, in a late article in the *Southern Law Review* (October, 1876), in which he attempts to maintain the distinction taken by the Wisconsin court between actions which affect the actual possession of the receiver, and suits which merely aim to obtain an adjudication of the party's rights, acknowledges that the weight of authority is against the doctrine. He says: "It is undoubtedly true that the present weight of authority is adverse to the exercise of any right of action against a receiver, other than that from which he derives his appointment and to which alone he is amenable. Deriving their notions of the sanctity of the receiver's office and functions from the English chancery, courts of equity in this country have almost uniformly denied any right of action against their receivers, unless leave of the court be first had for that purpose." The learned writer cites, in support of this statement, a large number of authorities, both English and American.

But whatever may be the rule for other courts, we think there can be no doubt as to the practice by which we are to be governed. We find the law laid down by the supreme court of the United States, in *Wiswall v. Sampson*, 14 How. 65, 66, and 67, as follows:

Thompson v. Scott.

“When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel v. Smith*, 9 Vesey, 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. (*Brooks v. Greathed*, 1 J. & W. 176; 3 Daniell’s Chan. Prac. 1984.) And the doctrine that a receiver is not to be disturbed extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined *pro interesse suo*, and this, though their right to the possession is clear. (1 Cox, 422; 6 Vesey, 287.) The proper course to be pursued, says Mr. Daniell, in his valuable treatise on pleading and practice in chancery, by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo*, and an order for such examination may be obtained by a party interested, as well when the property consists of goods and chattels or personalty, as when it is real estate. And the mode of proceeding is the same in the case of the receiver. (6 Vesey, 287; 9 *Ib.* 336; 1 J. & W. 178; 3 Daniell’s Chan. Prac. 1984.) A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgage, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court, to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for this purpose. The

Thompson v. Scott.

court will direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand, or as to the priority of the lien, etc., and take care that the fund be applied accordingly. It has been argued that a *sale of the premises on execution and purchase occasioned no interference* with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless. As we have already said, it is sufficient for the disposition of this case, to hold that while the estate is in the custody of the court, as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose. And upon this ground we hold that the sale by the marshal, on the two judgments, was illegal and void, and passed no title to the purchaser. This proceeding was explained by Lord ELDON, in *Angel v. Smith*, 9 Vesey, 335, speaking of the rule in respect to sequestrators, and which he held was equally applicable in the case of receivers. 'Where sequestrators,' he observed, 'are in possession, under the process of the court, their possession is not to be disturbed, even by an adverse title, without leave, upon the principle that the possession of the sequestrators is the possession of the court, and the court being competent to examine the title, will not permit itself to be made a suitor in a court of law, but will itself examine the title. And the mode is, by permitting the party to

Thompson v. Scott.

come in to be examined, *pro interesse suo*; the practice being to go before the master to state his title, and there is the judgment of the master, and afterwards, if necessary, of the court upon it. See, also, 10 Beav. 318; 2 Daniell's Prac. 1271; 2 Mad. 21; 1 P. Wms. 308.'"

The doctrine of the Wisconsin and Iowa cases is that any party seeking satisfaction out of a fund in the hands of a receiver, may prosecute his claim and have his rights adjudicated in a suit against the receiver, in any court of competent jurisdiction, without the permission of the court from which the receiver derives his appointment, provided the proceeding be such as not to disturb the actual possession of the receiver. If this doctrine be taken in all its latitude, I am not aware of any action at law which may not be thus maintained against a receiver, except replevin and attachment. The action of ejectment, though possessory, does not, in the first instance, touch the actual possession of the property involved. It determines the *right* of possession, but not until that right is established by judgment, and the court issues its writ of possession, is the *actual* possession of the defendant touched by the proceeding. Why, then, if the Iowa and Wisconsin doctrine be sound, might not ejectment, as well as trespass and all other actions, except replevin and attachment, be prosecuted against a receiver without any leave of the court of his appointment? And if this can be done, innumerable claims may be set up and established by the judgment of other courts against the judgment of the court holding the fund by the hand of its receiver. Can this be done? Could ejectment, for instance, be thus maintained against a receiver? Certainly not, so far as the federal courts are concerned. (*Wiswall v. Sampson*, 14 How. p. 65.)

In my judgment, the doctrine of the Iowa decision contravenes the whole scheme of equity jurisdiction in the matter of appointing receivers, and in the taking of possession, through them, of the property in litigation. The court of equity takes cognizance of a suit against an insolvent company or corporation, and where the danger exists that the litigation may prove fruitless to

Thompson v. Scott.

creditors, by waste or a fraudulent disposition of the property, the court will take it into possession by the appointment of a receiver. The property thus becomes a fund subject to the disposition of the court, and under its exclusive control. The principle that the court which has possession and control of a fund, has the exclusive right to determine all claims and liens asserted against it, is fundamental. Hence, every court of equity in such a case assumes to decide all controversies touching the subject matter of the suit and the fund; to determine the existence and priority of all liens; to adjust and settle all disputed claims; marshal the assets, and finally to distribute the surplus among the general creditors *pro rata*, upon its own principle of equality among creditors. The very ground and reason of this jurisdiction is the inadequacy of mere legal remedies. But, according to the Iowa decision, there is no reason why any party claiming satisfaction out of the fund, may not, without the consent of the receiver's court, assert his rights in any competent court, provided he does not attempt to disturb the possession of the receiver; and thus may the decision of the claims and controversies involved in the litigation be withdrawn from the court of equity, where they properly belong, and transferred to the courts of law. And the result would be that claims against the fund would be determined, not by the court having jurisdiction of the case and control of the fund, but by other and different tribunals. Judgments would thus be rendered against the receiver—in other words, against the fund; and the court having the fund in its possession would be compelled to treat such judgments as nullities, or recognize and pay them. Before the court of equity could, perhaps, make a final determination of the rights of the parties before it, other courts might render judgments against its receiver to an amount sufficient to absorb the whole fund or property, and the litigation would prove barren of results to the parties in equity. Such judgments against the receiver would be either valid or invalid. If invalid, it follows that suits against the receiver, resulting in such judgments, would be perfectly futile and useless, and for that reason they ought to be stopped

Thompson v. Scott.

by the receiver's court, for certainly such suits would harass and embarrass the receiver and expose him to the heavy costs of litigation; and, if they resulted in no benefit to the parties prosecuting them, it would be simply idle, if not absurd, to allow such actions to proceed against the receiver. But, doubtless, if the doctrine of the Iowa court be sound, judgments against the receiver would be valid to all intents and purposes, and they must be so treated by all courts in which they should be pleaded. This being the case, what follows? Why, that the court of equity, having control of the fund, would have no alternative but to recognize and pay the judgments and decrees rendered elsewhere against its receiver, and if the fund consisted, in whole or in part, of real estate, the judgments against the receiver would become liens upon the property, thus encumbering and casting a cloud upon the title. Under such conditions, the sale of the property under the decree of the court of equity to satisfy its judgments, would be hopeless and ineffectual. Thus would the whole purpose of the litigation in equity and of the taking possession of property through the receiver be utterly defeated. The absurdity of such a result requires no explanation. To proceed to the merits of the case, but quoted through your order. The view thus presented applies with redoubled force to railroad foreclosure suits in the United States circuit court. The non-resident citizen comes here to set up and enforce the lien of his mortgage, for the very reason that he thinks he would be exposed to injustice in the state courts from local prejudice. But no sooner does he get the railroad property in the hands of a receiver, than that officer, if the doctrine of the Iowa court be sound, is exposed to suits in the state courts upon claims and demands of all kinds, and thus the substantial ends for which the non-resident complainant comes here, is practically defeated. The receiver himself has no beneficial interests in the controversies waged against him in the local courts, and the litigation is, practically, between the non-resident citizen and the citizen of Iowa. Suits may be brought, and judgments unnumbered rendered against the receiver, all along the line of a railway, by just

Thompson v. Scott.

tices of the peace and other local courts. These judgments may, if valid, be made liens upon the railway property, and the federal court must reject them as nullities, or recognize and pay them out of the mortgaged property. If the federal court must recognize and pay them, the state courts thus take from the former part the power of determining, first, what debt shall be paid out of the funds in its hands; second, what claims shall be made liens upon the mortgaged property. Thus would the federal court sit merely to register and pay the judgments and decrees of the state courts, and thereby give them the same effect as if they were judgments of the federal court. But what if the judgments and decrees of the state courts are to be treated here as nullities, and so disregarded? Then why should the plaintiff in the state courts be allowed to prosecute suits against the receiver? *Out bona?* The plaintiff in the state court does not sue the receiver in his own right, but in his official capacity as receiver. He, in fact, sues the fund through the receiver who represents it. He cannot levy execution of his judgment upon the receiver's individual property. Unless he can obtain satisfaction of his judgment out of the fund in this court, his suit and judgment against the receiver are worthless. Then why should he be permitted to prosecute such suits? Why not require him to come at once, and in the first instance, into the only court which can give him any real satisfaction, the only court which has in its possession any property from which he can obtain payment of his claim? *But* assuming that this court would not sit here merely to register the judgments and decrees of the state courts, and to pay them, without inquiry, out of the trust fund in its possession, it may be asked what harm will result to the non-resident creditors, from permitting suits to proceed against receivers? The answer is that such judgments, even if we repudiate them and refuse to pay them, would cast a cloud upon our title, and seriously affect a sale of the railroad property. When the receivership is at an end and the property no longer under our control, but in the hands of a purchaser at the foreclosure sale, I know of no reason why the state court might not proceed to enforce their judgment by execution and sale. At all events, the apprehension of such

Thompson v. Scott.

a result would cast such a cloud upon the title as effectually to defeat an advantageous sale, and this furnishes an all-sufficient reason why we should, by injunction, and by process of contempt, prevent the prosecution of suits against our receivers.

Again, if any and everybody may sue our receiver without our consent, along the line of the road, innumerable suits may be prosecuted against him, and he may be thus exposed to the costs and expenses of ruinous litigation. Now, he is our officer, and suits would be prosecuted against him as such, and not against him as an individual. We have placed him in the breach and exposed him to a deadly fire. Shall we leave him naked to his enemies? Shall the court abandon him to his fate and compel him to pay the costs and charges of a ruinous litigation out of his own pocket? Or, if the court should authorize him to employ counsel and pay the costs of numberless suits out of the trust fund, what then? Why, it would follow that the fund in our hands might be wasted and squandered in useless and fruitless litigation.

Again, such a course would result in endless multiplicity of suits, which equity abhors. If, instead of prohibiting suits against our receivers, and requiring all parties having claims to come into the suit already pending before us, we allow any and every party so disposed to sue the receivers in the state courts of record, and before the numerous justices of the peace, a vast multiplicity of suits would be the inevitable result. But, on the other hand, let all claimants bring in their demands here, and we will direct them to be examined *pro interesse suo* before the master, and if, upon auditing them, we find them to be just, we will direct the receiver to allow and pay them, without litigation. If we find the claimant's demand doubtful, we will give him leave to prosecute his claim against the receiver before some competent court. Thus, by the exercise of sound and just discretion, this court may do speedy justice, and avert troublesome and expensive litigation. And such has been the uniform practice. When leave to sue is asked of us, if we find that a suit is necessary, we direct in what forum—consulting herein the convenience of parties, and exercising a judicial discretion.

Thompson v. Scott.

The argument of the supreme court of Wisconsin, is that the federal court "appoints receivers, who take possession of, and operate, the road. While so operating it, they make thousands, perhaps millions, of legal contracts for the transportation of freights and passengers, etc. Yet, upon the doctrine contended for, all litigation upon these causes of action, although, in many cases, being only between citizens of this state, would be drawn into the federal courts; and the state courts absolutely divested of jurisdiction, unless the federal courts saw fit first to grant it."

Now, this argument, from inconvenience, it must be admitted, is quite specious; but I cannot see its cogency, since it is admitted that the federal court being in possession of the entire property of the corporation, no execution could be levied without its consent. Of what avail, therefore, would a judgment be against the receiver, without the consent of the federal court? What practical difference can there be between the necessity of obtaining this consent before, and after, judgment? If the suitor comes into the federal court and prosecutes his claim, there is a fund under the control of the court recognizing his claim or giving him judgment, to satisfy his claim or judgment. If, on the contrary, he goes into the state court, he may get a judgment, but there is nothing out of which he can obtain its satisfaction. His judgment is barren of results. Which, then, is the better forum for the claimant to resort to, assuming that both will deal justly with him? Since all suits against the receiver, as such, for claims growing out of his operation of the road, must be against him in that capacity, and must be satisfied, if paid at all, out of the property under the control of the federal court, why should not the suit be brought in the same court, or elsewhere, with its consent?

It must, moreover, be borne in mind that the inconveniences suggested by the supreme court of Wisconsin, are necessarily but temporary, since the possession of the court ceases with the close of the litigation. Unless the respondent shall stipulate to dismiss the suit in the state court, an attachment against him will issue.

ORDERED ACCORDINGLY.

Bracken v. Johnston.

BRACKEN, v. JOHNSTON.

1. An attachment of the property of a debtor is *ipso facto* dissolved if proceedings in bankruptcy are commenced within four months thereafter, upon which the debtor is adjudicated a bankrupt and a deed of assignment be made. (Rev. Stats. sec. 5044; sec. 14 of original bankrupt act.)
2. A creditor who proceeds in a state court by a writ of attachment on which he seizes the property of his debtor, and realizes his judgment obtained in such a suit, by a sale of the property attached, is liable to the assignee in bankruptcy of the debtor, appointed under proceedings commenced in the bankruptcy court within four months of the levy of the attachment, although the assignee did not appear or defend the attachment suit, or make any attempt to arrest the attachment proceedings. (*Wilson v. City Bank*, 17 Wall. 473; 2 Cent. Law Jour. 40; and *Eyster v. Giff*, 91 U. S. R. 521, 8 Cent. Law Jour. 250, distinguished.)

(Before MILLER, Circuit Justice.)

Bankruptcy.—Attachment of State Court Dissolved by Bankruptcy Proceedings.

THIS case comes before the circuit court on a writ of error to the district court. The plaintiff in error, as assignee of Browne, a bankrupt, sued the defendant Johnston, for the value of goods seized under a writ of attachment against Browne in favor of Johnston, in the state court, and sold under the proceedings in that case for Johnston's debt. The district court, to which the case was submitted without a jury, made the following finding of facts and conclusions of law, on which it rendered judgment in favor of defendant: "That William P. Browne, the bankrupt, resided at Tama county, Iowa, where also live the parties to this suit. On the 23d of September, A. D. 1872, defendant Johnston commenced suit against Browne, in the district court of Tama county, upon an alleged indebtedness due upon the sale of grain, and sued out of said court in said suit a writ of attachment, which, under the direction and by the personal procurement of the defendant Johnston, was levied upon property described in the petition—

(LAW OFFICE OF THE CIRCUIT COURT)

Brackish v. Johnston.

2d. That on the 21st day of January, A. D. 1873, and within four months of the suing out of said attachment, a petition in bankruptcy was filed by certain of Browne's creditors, in the United States district court, from whence this suit comes, praying that Browne be adjudged a bankrupt.

3d. That on the said 21st day of January, A. D. 1873, Browne was served with the original notice in the suit pending in the state court.

4th. That on the 25th day of January, A. D. 1873, the order to show cause in the bankruptcy proceedings was duly issued, was served on the 8th day of February, A. D. 1873, and on the 14th day of February, A. D. 1873, the said Browne was, by order of the court sitting in bankruptcy, duly adjudged a bankrupt.

5th. On the 18th day of February, A. D. 1873, Browne, the bankrupt, filed in the district court of Tama county, his answer in the suit brought against him by Johnston, contesting the claim upon which the suit was founded. On the 25th day of February, A. D. 1873, a trial was held in that court, when the issue above joined was found for the plaintiff Johnston, and a judgment rendered in his favor for \$2,264.15 and costs, and an order for a special execution to sell the attached property.

6th. On the 28th day of February, A. D. 1873, special execution was issued, which, under the direction and procurement of Johnston, was levied upon the attached property as the property of Browne; and afterwards, on the 22d day of March, A. D. 1873, the sheriff, under Johnston's direction, sold the property as belonging to Browne, that Johnston was present at the sale, bid upon some of the property offered, and received from the sheriff the avails of the sale; that the proceeds amounted to \$2,349.40, and the costs of the suit and sale were \$177.50.

7th. That on the same 22d day of March, A. D. 1873, plaintiff was duly elected and qualified as assignee in bankruptcy of the estate of said Browne, and received his deed of assignment as provided by law.

8th. That afterwards, and previous to the commencement of

Bracken v. Johnston.

this suit, plaintiff in error made demand upon said Johnston for a return of said property, which demand was refused and the action commenced.

9th. That, at the time Johnston sued out the attachment, he had reasonable cause to believe Browne was insolvent.

10th. That the defendant directed the sheriff in the levy of the attachment and execution, and that if Johnston is otherwise liable, his direction and control over the sheriff sufficiently appears.

The court below found as conclusions of law:

1st. That the jurisdiction over the property acquired by the state court in the attachment proceedings was not divested by the bankruptcy proceedings.

2d. That, under the judgment and order of the state court, the property attached was adjudged to be the property of the defendant in that case, Browne; and that his assignee in bankruptcy is estopped from questioning such adjudication, and that defendant Johnston obtained a good title to the said property under said sale, and that he is not liable to plaintiff in this action for either the property or its proceeds.

3d. That the defendant is entitled to judgment for costs in this case against the plaintiff.

The plaintiff sued out a writ of error.

H. B. Fouke, for the plaintiff in error.

James T. Lane, for the defendant in error.

MILLER, *Circuit Justice*.—The question thus presented to me for consideration is very clear and simple in its statement, but none the less difficult of solution. It is whether a party proceeding by a writ of attachment, and seizing the goods of his debtor, and realizing by judgment and sale under execution the whole or part of his debt, is liable to an assignee in bankruptcy of the debtor, appointed under proceedings instituted in the bankruptcy court within four months of the levy of attachment, though no appearance or defence was made by the assignee in the attachment proceedings, or any attempt to arrest them. I

Bracken v. Johnston.

say the question is one not easy of solution, because it occupies debatable ground, in which two important principles of the bankrupt law seem to come in conflict, namely: the principle that no person shall, by a writ of attachment against the bankrupt, obtain a preference for his debt over other creditors, unless issued more than four months before the commencement of the bankruptcy proceedings; and the principle that the state courts are not divested of their jurisdiction of cases pending in them by the initiation of bankruptcy proceedings against one of the parties to such a suit, unless it be brought to the notice of the state court by some appropriate proceeding in that case.

The first principle rests upon the language of section 5044 of the Revised Statutes, which is part of section 14 of the original bankrupt law. It reads as follows: "As soon as the assignee is appointed and qualified, the judge, or, when there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same has been attached by *mesne process* as the property of the debtor, and *shall dissolve any such attachment made within four months* next preceding the commencement of the bankruptcy proceedings."

The other principle rests upon the fact in this case that no attempt was made, by the assignee or any one else, to bring to the notice of the state court the fact that the debtor had been declared bankrupt, and that it proceeded in its usual course of judgment, and execution of that judgment, without any apparent error or defect of jurisdiction in these proceedings, and upon certain opinions of the supreme court sustaining its right to do so.

If there can be found any middle ground by which both these principles can be left to their just and proper operation, we ought to adopt it in the solution of this case. I think there is such a ground. The two opinions of the supreme court in which the

Branken v. Johnston

authority of the state courts has been most firmly sustained were probably delivered by myself. I mean the case of *Wilson v. The City Bank*, 17 Wall. 473, and the case of *Dyster v. Gaff*, 41 U.S. R. (1 Otto) 521. But in both these cases the proceedings of the court which were upheld were the exercise of the regular and ordinary powers of the court in rendering a judgment or decree against the party before it. And I still adhere to the doctrine that, if, by the usual process of the court, a plaintiff secures a judgment against the bankrupt, which judgment is of itself a lien, or by virtue of the levy of an execution becomes a lien, before the commencement of the bankruptcy proceedings, that lien must prevail; or when the state court, in pursuance of a jurisdiction invoked before the bankruptcy proceedings commenced, enforces a lien which has by the bankrupt law itself a priority over other creditors, as a mortgage or other specific lien, its proceedings are valid and effectual, notwithstanding the commencement of proceedings in bankruptcy while they are pending. But there is a very marked difference in the favor with which such a lien should be regarded and a lien obtained by the extraordinary and summary proceeding of attachment, in which the plaintiff, being made aware of the failing condition of his debtor, takes the remedy into his own hands, and, by an *ex parte* proceeding appropriates, by his own volition, the debtor's property to the exclusive payment of his own debt. And it was precisely this proceeding which the provision I have cited from the bankrupt law was intended to prevent, by declaring that all such attachments are dissolved by the assignment of the bankrupt's property, if made within four months next preceding the commencement of the bankruptcy proceedings. The purpose of the act was to put a creditor who undertook to secure a lien by attachment in precisely the same condition as one who took a preference or lien by the consent of the debtor. In both cases the creditor proceeded at his own hazard. If the debtor escaped the bankruptcy court for the prescribed time, the preference or lien remained valid. If he did not, it was void.

Bracken v. Johnston.

absolutely. The language of the section I have cited is very strong in this direction, since to repel the idea that the attachment is merely voidable, it is declared that the making of the deed to the assignee shall, by operation of law, vest title to property in the assignee, and dissolve any attachment made within the four months. I think this was intended to mean that, in the contingency mentioned, the attachment was *ipso facto* dissolved, and the property attached became freed from the effects of the suit, and that it required no judicial proceeding to restore it to that condition.

This view of the matter does not divest the court in which the attachment suit is pending of its jurisdiction over the case and the parties. It merely declares that the title to the attached property having been vested, by proper judicial proceeding, in the assignee, the lien of the attachment is at an end.

The court can proceed to judgment against the party, and issue its execution. If property liable to it can be found, it can be enforced. If not, it is like the judgment in any other case against a debtor without means. And there is no hardship in this, for the reason that the attaching creditor was informed by the provisions of the bankrupt law that he initiated his attachment proceeding subject to its being rendered ineffectual by proceedings in bankruptcy within four months. This view, I think, reconciles the two opposing principles. It leaves the general jurisdiction of this state court, or any other court in which the attachment suit is pending, unaffected; and it can proceed as if no bankruptcy proceeding had been commenced, and its judgment is valid in every other respect except that the lien on the property is gone. It gives full effect to the purpose of the bankrupt law, that no such attachment shall prevail when instituted within four months before that law is called into operation, and in subordination to which principle the attaching creditor instituted his proceedings. The present case very forcibly illustrates the necessity of adopting this rule; if full effect is to be given to the provision of the bankrupt law, for the finding of facts shows that, though the bankruptcy proceedings were instituted

Brooks v. Mills County.

within four months after the levy of the attachment, the assignee was *not* appointed until the very day the property was sold under Johnston's execution. It was, therefore, impossible that the assignee could have interposed at any stage of the proceeding in the state court, to bring to its notice the bankruptcy proceedings, or to procure an order dissolving the attachment, and the creditors whom he represents were without remedy, notwithstanding the positive declaration of the bankrupt law. I am of opinion that, on the facts found by the district court, the defendant, Johnston, was liable for the value of the goods, as evidenced by the sum for which they sold. The judgment of the district court is reversed, and the case is remanded to the district court, with directions to enter a judgment against him accordingly.

JUDGMENT ACCORDINGLY.

NOTE.—See *McCord v. McNeil*, ante, p. 173; *re Hazens*, post.

JOHN W. BROOKS and ALPHEUS HARDY v. MILLS COUNTY.

1. A plea in abatement of a cause in the federal court that another suit is pending in a state court, is not good where the parties to the two suits are not the same.
2. Whether a party, in the United States circuit court for any district, may plead in abatement of a suit therein the pendency of a prior suit *within the same district*, between the same parties, and upon the same subject matter, discussed, and the cases commented on, by LOVE, J.

(Before LOVE, J.)

Plea in Abatement in Federal Court of the Pendency of Another Suit in the State Court.

THE complainants exhibited a bill in equity to quiet the title to certain real estate, to which the defendant filed a plea in abatement, setting up the pendency of a suit in the district court of

Brooks v. Mills County.

Mills county, Iowa, involving the same subject matter, to which plea the complainants replied that they were not made parties to the suit in the Mills county court.

Messrs. Hall & Stone, for the plaintiffs.

Mr. D. H. Solomon and *Mr. L. W. Ross*, for the defendant.

LOVE, J.—This cause is before the court upon a plea in abatement. The plea sets up the pendency of a prior suit upon the same subject matter, and between the same parties, in the district court of Mills county, Iowa. If the plea really presented the question which the pleader intended to raise, it would be one of no little difficulty. That question is whether or not a party may, in the United States circuit court for any district, plead in abatement of a suit therein the pendency of a *prior suit in a state court within the same district*, between the same parties, upon the same subject matter. This precise question has never been decided by the supreme court of the United States. It seems, however, to be assumed by counsel that it has been repeatedly decided by the circuit courts of the Union. We shall presently see how much of truth there is in this assumption.

Let us first, however, consider the question in the light of reason and sound policy. If the circuit court of the United States, and a state court in the same federal district, may proceed at the same time to adjudicate the same matter between the same parties, what results must inevitably follow? First, the suitor would be harassed by the same litigation in two several tribunals of competent jurisdiction. Congress has seen fit so to frame the law as to leave the state courts in possession of concurrent jurisdiction with the United States circuit court in civil actions and suits between citizens of different states. Why, then, should the suitor be harassed with two suits at the same time, for the same matter, before two courts of competent and concurrent jurisdiction?

Two courts so proceeding and exercising judicial power within the same territorial limits would move upon parallel lines, with

Brooks v. Mills, County.

no authority to review each other's judgments, and no common superior to bring them into harmony. Thus the federal court might decide the controversy for the plaintiff and the state court for the defendant, so that the parties would have a conflicting adjudication of their rights. The judgment of the one court might be a lien upon the defendant's property, and the judgment of the other a lien upon the plaintiff's property. The one might proceed to levy execution upon the plaintiff's goods, and the other upon the defendant's goods. All this would lead to "confusion worse confounded." It would tend to bring the two jurisdictions into unseemly and dangerous conflict. But it is said that this evil of conflicting adjudications could be prevented by very simple means. The party first obtaining judgment could go into the other jurisdiction and plead his judgment *pro darrein* in bar of the action there pending. It is evident, however, that this remedy might prove utterly impracticable and ineffectual. Since the two courts might render diverse judgments on the same day, or, at all events, at times so near as to render it impossible for the successful suitor in the one court to set up his judgment in bar in the other. Again, the unsuccessful suitor in the one court might very easily suspend the judgment against himself by appeal or otherwise, so as to prevent his successful adversary from pleading his judgment in bar in the other jurisdiction in time to make the plea effectual. It would, therefore, seem most rational and just that a plea in abatement should be allowed in order to avert consequences so mischievous. It must, however, be conceded that the current of authority, so far as there is any authority on this question, runs in opposition to the plea in question. The dicta of the United States circuit judges seem to proceed upon the assumption that the two jurisdictions are foreign to each other in the same sense that the courts of independent countries and of the different states of the Union are foreign to each other. Of course the pendency of a suit in a foreign country, or even in a state or district different from that of the court in which the plea is tried, would be no

Brooks v. Mills County.

matter of abatement. Where two jurisdictions exist and exercise judicial power over wholly different territories, there can be no such mischiefs to be apprehended as I have pointed out, flowing from conflicting adjudications and diverse liens, and processes of execution. Therefore no very serious mischiefs could arise from opposite and conflicting judgments upon the same subject matter, and between the same parties, in two or more different states of the Union. But the case would be otherwise if two such hostile judgments should be rendered by competent courts exercising judicial power within the same territorial limits. Yet some of the United States circuit courts seem wholly to ignore this manifest distinction, and to reason upon the subject as if the state courts and the federal circuit court in the same state exercised jurisdiction entirely foreign to each other. I have examined numerous state authorities, and I find that they go no farther than to establish the proposition that an action pending in a foreign court, or in a court of another state of the Union, or in a court of the United States in another state or district, cannot be pleaded in abatement. (*Brown v. Joy*, 9 Johns. 221; *Newell v. Newton*, 10 Pick. 470; *Walsh v. Durksh*, 12 Johns. 99; *McFilton v. Lobb*, 13 Illinois, 486; *Mitchell v. Branch*, 2 Paige, 606; *Salmon v. Walters*, 9 Dana, 422.) But not to stop. In all the reported cases in the federal circuit courts, except *Loring v. Marsh*, 12 Clifford, 322, the prior suits were pending either in the courts of foreign countries, or in the courts of other states, or in some United States circuit court for a district other than that of the court in which the matter in abatement was pleaded. (*White v. Whitman*, 1 Curtis, 494; *Lyman v. Brown*, 2 Curtis, 559; *Wadleigh v. Vesey*, 3 Sumn. 185.) The proposition in *Loring v. Marsh* is not strictly in point, since it came before the court, not by plea in abatement, but by motion to continue the cause in the United States circuit court of Massachusetts, upon the ground that the same cause was pending in the supreme judicial court of that state. Mr. Justice Chief-Justice, however, seems to have considered the motion analogous to a plea in abatement, and he discussed it in that view. Thus he says,

Brooks v. Mills County.

"cases may unquestionably be found deciding that the mere pendency of another suit for the same matter, between the same parties, in another jurisdiction, may be pleaded in abatement or in bar of another suit." But he adds that, "the undeviating rule in this circuit has been that the pendency of another action for the same cause in a state court is not a good plea in abatement." "Suppose, however," he adds, "it were otherwise, the rule would not apply to this case, because the nature of the proceedings is different, the *parties are not the same*, and there are questions presented for decision here which are not involved in the suit in the state court." It will not escape notice that Mr. Justice CLIFFORD admits that, even supposing the plea to be valid, the rule would not apply to the case he was deciding, "because the nature of the proceedings is different, the *parties are not the same*, and there are questions presented for decision here which are not involved in the state court." In view of this statement, the opinion expressed by the learned and venerable judge, that the pendency of a suit in the state court could not be pleaded in abatement or bar in the federal court in that state, appears to be something in the nature of an *obiter dictum*. I have examined carefully all the cases cited by him from the reports of state and federal decisions, and I do not hesitate to affirm that not one of them is in point to sustain his *dictum* when applied to such cases as *Loring v. Marsh*, and the case now before us. In the cases cited, the suits pleaded in abatement were pending invariably either in foreign countries, or in other states, or in United States judicial districts other than the one in which the plea was presented. Whoever may wish to verify this statement can readily do so by reference to the cases cited by Mr. Justice CLIFFORD and also in this opinion. I have not examined all the English cases, but I apprehend that such of them as appear to be opposed to the validity of the plea relate to the pendency of prior actions in the courts of foreign countries, or of the British colonies, or Scotland, or Ireland, all of which are foreign to the English judicature. I venture to state that an English case cannot be found in which it has been held that the pen-

 Brooks v. Mills County.

dency of a suit in one of the courts of Westminster was not a good plea in abatement to a subsequent suit in another of the courts of Westminster of concurrent jurisdiction. (*Maul v. Maury*, 7 Term Rep. 470; *Imlay v. Ellfsen*, 2 East, 453; *Dillon v. Alvares*, 4 Ves. Jr. 358; *Foster v. Vassal*, 3 Ark. 557; *Bayley v. Edmunds*, 3 Swanst. 703; *Howell v. Waldren*, 2 Chan. Cas. 35; 2 Daniell's Chan. Prac. 721; Story's Eq. Pleading, 741.)

The case now before us presents no real difficulty, since it appears upon the face of the plea that the parties to the suit in the state court are not the same as the parties to this bill. The plea must, therefore, be overruled, and the respondent required to answer.

PLEA OVERRULED.

NOTE.—The adjudged cases do not conclude the exact point that a defendant may plead in abatement in the federal court the pendency of a prior suit, *within the same district*, between the same parties, and upon the same subject matter. The following is a brief abstract of the more important cases upon the subject:

Lyman et al. v. Brown, Hibbard, & Co. (2 Curtis, 559).—Mr. Jenckes, at the present term, moved for leave to plead *puis darrein* that the plaintiffs had recovered a judgment against the defendants for the same cause of action in the *province of Lower Canada*.

By the Court.—The defendant could not have pleaded the *lis pendens* in a foreign jurisdiction in abatement of this action. (See on this point *Hart v. Granger*, 1 Conn. 154; *Ralph v. Brown*, 3 Serg. & Watts, 339.

White v. Whitman (1 Curtis, 494).—In the circuit court for the district of Rhode Island. Plea: The pendency of another action previously commenced in the superior court of the county of Windham, in the *state of Connecticut*.

By Judge CURTIS.—"The pendency of another action in a foreign court for the same cause is not a good plea in abatement at common law. The question is whether the court of Connecticut is to be considered a foreign court within the meaning of the law. In *Brown v. Joy*, 9 Johns. 221, it was held that such a plea of a former action in another state was not a good plea, and in *Walsh v. Durkin*, 12 Johns. 99, the same law was held applicable to a plea of a former suit in a circuit court of the United States."

Wadleigh v. Vesey (3 Sumn. 165) was decided upon the express ground that the parties were not the same, nor the subject matter the

Brooks v. Mills County.

same. In all cases in which the pendency of another action is pleadable to the second suit, two things must concur: First, that the second suit must be by the same plaintiff against the same defendant; second, that it should be for the same cause of action. "All the cases agree that the plaintiff must be the same. In the present case it is impossible to say that the cause of action is the same."

In *Salmon v. Wooton* and others, 9 Dana, 423, much relied upon by Mr. Justice CLIFFORD, in *Loring v. Marsh*, 2 Clifford, 322, the plea was offered in the court of chancery of Kentucky. It set up the pendency of a former action in the circuit court of Clarke county, *Indiana*, another state.

In *Brown v. Joy*, 9 Johns. 221, the defendant pleaded in the New York court the pendency of another action for the same cause in the court of common pleas of Bristol, *Massachusetts*. The plea was held bad upon the ground that the *Massachusetts* court was a foreign court.

In *Walsh v. Durkin*, 12 Johns. 99, the plea was the pendency of another action in the United States circuit court for the district of Virginia. This is the case referred to by Mr. Justice CURTIS in *White v. Whitman*, in which he says "the same law was held applicable to a plea of a former suit in a circuit court of the United States." But the circuit court of the United States was for the district of Virginia, whilst the plea was presented in a state court of New York.

In *Mitchell v. Bunch*, 2 Paige, 606, the bill prayed for a writ of *ne exeat republica*, to restrain the defendant from leaving the state of New York until discovery and relief could be obtained. A *ne exeat* was allowed and bail fixed at \$1,000. The defendant then filed an affidavit showing that the complainant had also caused him to be arrested in the circuit court of the United States, and to be holden to bail in an action of debt on the same judgment which was the foundation of this proceeding, which suit was still pending. The chancellor ordered the *ne exeat* to be discharged, on the ground that "where a judgment debtor has been sued upon the judgment in the circuit court of the United States, *sitting within the same state*, and held to bail in such suit, and a bill has been filed against him in the court of chancery to obtain payment of the same judgment, and a *ne exeat* issued thereon against him, the *ne exeat* will be discharged, unless the complainant elects to release the defendant from the arrest and bail in the circuit court of the United States;" the chancellor saying that, "it certainly cannot be necessary, for the protection of this complainant's rights, that the defendant should be compelled to give security in two different suits pending at the same time in different courts, and for the recovery of the same debt." The observation of the chancellor that "the mere pendency of a suit in a foreign court, or in a court of the United States, cannot be pleaded in abatement or in bar to a proceeding in a state court," is mere *obiter*, at

Brooks v. Mills County.

best. The observation would, however, be strictly just if the chancellor referred to a United States court sitting in some other state or district.

In *McTilton v. Love*, 13 Ill. 486, the prior cause pleaded was in the state court of *Missouri*. The plea was presented in a state court of Illinois.

In *Haight v. Holley*, 3 Wend. 258, the plea was the pendency of a subsequent suit, which was, of course, bad, and so held. But MARCY, J., remarks that "where two suits are commenced for the same cause of action at different times, the pendency of the former may be pleaded in abatement of the latter."

In *Newell v. Newton*, 10 Pick. 470, the court held that "a plea that, before the action was commenced, the same plaintiff impleaded the same defendant for the same cause of action in the court of another state, without averments showing the jurisdiction of the court of such state over the subject and over the parties, is not a good plea in abatement." Whether with such averments the plea would be good, *quere?*

It is clear that the foregoing cases do not go to the length of holding that the pendency of a prior suit in a state court is not a valid plea in abatement to a suit for the same cause and between the same parties to an action in a United States court *sitting in the same state*.

Mr. Justice MILLER, in a case in the Minnesota circuit, June term, 1875, held that where the prior suit pending in the state court was not of sufficient scope to afford *all* the relief sought in the second suit in the federal court, and would not be conclusive on all the parties as to such relief, it could not be pleaded in abatement; and so the learned justice thought in respect of the absence of parties in the first suit having an *interest* in the matter in litigation in the second. And he intimated his inclination to the opinion that where the parties are identical and the scope of the subject matter equally so, the pendency of a prior suit in the state court within the territorial limits of the district where the second suit is brought in the federal court, may be properly pleaded in abatement, or, at all events, will operate to suspend the action in the latter.

In re Dodge.

In re DODGE, Bankrupt.

Under the bankrupt act (Rev. Stats. sec. 5101), the *state* is entitled to be preferred to private creditors of the bankrupt.

(*Before MILLER, Circuit Justice.*)

Bankrupt Act.—Revised Statutes, Section 5101.—State as Preferred Creditor.

THE facts appear below.

Craig & Collier, for the state.

McOrary & Hageman, for the assignee.

The bankrupt was indebted to the state of Iowa, on account of contract, for the labor of convicts confined in the penitentiary at Fort Madison, the debt being secured by bond with sureties. The question arose, whether or not, under section 5101, Revised Statutes of the United States, the *state* has a right to have its claim declared prior to those of other creditors, and to have the same paid in full out of proceeds of bankrupt's estate in hands of assignee? The assignee objected to the allowance of same as a preferred claim, urging that congress had not intended by said section 5101 to give a state any greater preference under the bankrupt law than the statutes of such state gave to it, and that there is no statute in the state of Iowa giving the state such a preference; therefore, congress *could not* do so. The assignee also urged that a law which provides that one creditor, whether a state or individual, having no lien prior to bankruptcy, by virtue of contract, or statute, or custom, or otherwise, shall be paid, to the exclusion or prejudice of other creditors, violates the fundamental principles upon which a bankrupt law is based, and that it is simply a legislative confiscation of the debtor's estate for the benefit of a privileged class, and, when passed by congress, is unconstitutional and void.

The district court ordered that the claim be allowed in full, as a preferred debt, and that the assignee pay the same out of funds

Farmers' Loan and Trust Company v. Central Railroad.

in his hands belonging to said estate, after paying prior claims, if any.

The order was brought to the circuit court for review.

MILLER, *Circuit Justice*, after hearing the argument of counsel, affirmed the judgment of the district court.

AFFIRMED.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee, v. THE
CENTRAL RAILROAD OF IOWA.

This court heretofore rendered a decree of foreclosure of a railway mortgage in favor of the plaintiff, as the trustee for all the bondholders; certain bondholders, dissatisfied with the decree, appealed to the supreme court (3 Otto, 412). The supreme court refused to dismiss the appeal, which is still pending in that court, but vacated the supersedeas; certain bondholders, in March, 1877, applied for an order to compel the trustee to sell, under the decree, pending the appeal, against its judgment of what was best for all the bondholders, and the court refused to interfere with the discretion of the trustee. The same bondholders then applied to the supreme court for a *mandamus* to compel the circuit court to order the trustee to sell, pending the appeal, which the supreme court (March 27, 1877) refused. The same bondholders now (May term, 1877) renew their application for an order to the trustee to cause the special master to execute the decree, notwithstanding the pending appeal and the protest of other bondholders: *Held*, that individual bondholders, not parties to the decree, had no *legal* right to have the decree executed, pending the appeal, against the judgment of the trustee as to what was for the best interests of all the bondholders; but that the trustee was at liberty to execute the decree or not, pending the appeal, as in its judgment was best for all the *cestuis que trust*.

(Before DILLON and LOVE, JJ.)

Execution of Decree Pending an Appeal.

MR. ALEXANDER and certain bondholders not parties to the decree of foreclosure heretofore rendered in this cause in favor of the trustee, applied, at chambers, in March, 1877, and again to

Farmers' Loan and Trust Company v. Central Railroad.

the court at this (May, 1877) term, for a peremptory order on the trustee to cause the property to be sold under the decree, notwithstanding a pending appeal from that decree, and the protest of other bondholders against such a sale.

The facts material to an understanding of said application are as follows:

1. The Central Railroad Company of Iowa made a first mortgage, or trust deed (July 15, 1869), upon its road and property, to the Farmers' Loan and Trust Company, trustee, to secure certain first mortgage bonds. This mortgage contained a condition, that, upon default in payment of interest, the whole debt should become due, and that, upon request of the holders of a *majority* of the bonds, the trustee should foreclose. It also contained a condition, that, in case of foreclosure sale, at a like request, the trustee should purchase the property for the benefit of the bondholders secured by said mortgage, *pro rata*.

2. Afterward two other mortgages, the second and third, were successively executed to the same trustee, upon the same property, and with like conditions.

3. Default was made in payment of interest, and some of the bondholders (not a majority) having requested the trustee to foreclose, which was declined, Charles Alexander and others, holders of some of the first mortgage bonds, brought their bill (June 2, 1874) in the United States circuit court for Iowa, to foreclose, making the trustee, the railroad company, and others, defendants.

This foreclosure suit was resisted by the action of the officers of said railroad company, and the said company filed two demurrers to the bill of foreclosure, one in July, 1874, and the other in January, 1875, both sworn to by Mr. Pickering, the superintendent of the road, and which were overruled by the court. The ruling of the court on the first demurrer, at the October term, 1874, is reported in 3 Dillon, 487. The second demurrer to the bill of the trustee was on the same ground, and was likewise overruled at the rules, and the defendant company was required to answer, which it did in March, 1875, and the time

Farmers' Loan and Trust Company v. Central Railroad.

allowed by the equity rules for taking proofs not having expired at the May term, 1875, of the court, the cause went to the October term, 1875.

The bill of foreclosure filed by Alexander and others was consolidated with the bill filed by the trustee (3 Dillon, 487), and the issues were made on the bill of the trustee, and the cause proceeded thereafter in the name of the trustee alone.

On January 7, 1875, a receiver was appointed, and took possession of the property, and operated the road.

4. Prior to the October term (1875) of the court, various efforts were made by the several sets of bondholders, the stockholders and creditors, to adjust their rights and differences so as to obtain an early and satisfactory decree. These efforts resulted in an agreement, by counsel representing several sets of bondholders, upon a decree, and the articles of incorporation to be adopted by the new company which should take the property from the trustee, when it should purchase the same at the sale, pursuant to the conditions and the terms of the decree. Messrs. Cowdrey, Sage, Buell, and other bondholders under the first mortgage, did not join in these arrangements, and requested, in writing, the solicitor of the trustee to present to the court their demand for an ordinary decree of foreclosure, for the payment of the bonds in the order of their priority, and if the request was not complied with, to take an appeal (3 Otto, 412). This request was presented, but no order was made in respect of it at that time.

5. On the 21st day of October, 1875, the court made uncontested orders for the amount due, and directing the receiver to pay certain creditors for materials and supplies furnished for, and services rendered to, the railroad company during its control by the receiver and prior to that, in effect giving to these claimants a priority over all the mortgages.

6. On the 22d day of October, 1875 (the next day), a final decree was rendered in the name of the trustee, without any actual hearing, adjudicating the amount due upon the several mortgages, directing the sale of the property by the master, and

Farmers' Loan and Trust Company v. Central Railroad.

also directing the trustee to bid in the property for the amount due upon the first mortgage, as trustee, for the benefit of the first bondholders, but providing for an ultimate or contingent benefit to the second and third bondholders, general creditors, and stockholders. This decree is claimed by certain bondholders to have been a consent decree, which is denied by Cowdrey, Sage, *et al.* (3 Otto, 412.)

7. On the 16th day of December, 1875, application in the name of the trustee, for the benefit of Sage, Buell, and Cowdrey, was made to the circuit judge, at his chambers in St. Paul, Minnesota, for the allowing of an appeal with supersedeas. This was denied by the judge, who stated, in writing, in connection with such denial, that since the October term had not ended but was adjourned to January 11, the persons for whose benefit the appeal was prayed could appear at that time and ask to be made parties and have the decree corrected. (3 Otto, 412.)

8. Accordingly, Sage, Buell, and Cowdrey appeared at the adjourned term, in January, 1876, and moved for leave to intervene as complainants and to have the decree set aside. The motion to set aside the decree was overruled by the court (DILLON and LOVE, JJ.), but it was ordered that the petitioners be "permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their said several interests therein, and in their own names, an appeal to the supreme court from the decree entered herein on 22d October, 1875." An appeal was allowed, bond fixed at \$2,000, and if to operate as supersedeas \$1,000,000, and in either case to be given in thirty days.

9. The parties did not file any bond within the thirty days; but after the expiration of that time, they presented a new petition to his honor, Mr. Justice MILLER, for an allowance of appeal with supersedeas, and it was allowed February 16, 1876, and bond for supersedeas approved by him in penalty of \$20,000.

10. The appeal was perfected, and at the October term, 1876, of the supreme court, on motion therefor, that court vacated the supersedeas (3 Otto, 412), but overruled the motion made by the

Farmers' Loan and Trust Company v. Central Railroad.

same party to dismiss the appeal, and the cause is still pending in that court.

11. After the supersedeas was vacated, it was ascertained that "*The Financier*," one of the newspapers in which the decree directed the notice to be published, had changed its name to "*The Public*." This fact being shown to the circuit judge, he made an *ex parte* order at chambers (January 8, 1877), directing the notice of the sale to be published in "*The Public*," instead of "*The Financier*." This order was made at the instance of Mr. Alexander and the said committee.

The supersedeas was vacated by the supreme court December 18, 1876, and a certified copy of its order was filed in the office of the clerk of the circuit court at Des Moines in vacation, in January, 1877.

Thereupon, shortly afterwards, a certain committee of bondholders asked the trustee to order the special master to proceed with the execution of the decree, make sale of the road, etc. The trustee failing to do this, the committee, without the consent of the trustee, directed the master to sell, claiming the right so to direct under equity rules 8 and 10. This the master refused to do. Thereupon the trustee petitioned the court for advice in respect to ordering the sale; and a committee of bondholders moved for an order directing the trustee and master to execute the decree.

This petition and motion were presented to the circuit judge, at his chambers in Davenport, in February, 1877, and the hearing fixed, at Davenport, for Saturday, March 3d, 1877, and Judge LOVE was requested by the circuit judge to be present, and all parties were notified by telegraph. Judge LOVE accidentally missed the train, and in consequence was not present at the hearing, and by consent of counsel the papers and arguments were sent to him by the master, unaccompanied with any opinion of the circuit judge. Judge LOVE's opinion, which is given below, was transmitted to the circuit judge, who annexed thereto his opinion, also given below, and the same were filed March 12th, 1877. (Western Jurist, July, 1877, p. 428; 5 Cent. Law

Farmers' Loan and Trust Company v. Central Railroad.

Jour. 56.) The trustee's counsel (Mr. Turner), in his printed argument, opposed the application of the committee, because of the protest of certain other bondholders, and because, in its judgment, the sale pending the appeal might lead to grave complications. The counsel for the committee opposed this contention, and insisted that any bondholder had the legal and absolute right to have the decree executed (equity rules 8, 10) against the will or judgment of the trustee.

H. B. Turner, for the trustee.

R. L. Ashhurst and *C. C. Cole*, for a committee of bondholders.

LOVE, J.—I have gone carefully over the papers, and given them the best consideration I could. I proceed to give my impressions as to the disposition which ought to be made of the case: I have a very decided opinion that the court ought not, at present, and upon the showing made by the majority of the bondholders, to order the trustee to execute the decree.

The case is a peculiar one. The circuit court did not enter the decree upon any independent consideration of the rights and equities of the parties, but solely upon the assumption that the parties to be affected by it assented to the provisions of the decree. Now, it turns out that this assumption was not well founded, so far as the appellants (*Cowdrey et al.*), who are now resisting the execution, are concerned. The appellants are consequently seeking to get the decree reversed. It must be borne in mind that they have never yet had the judgment of any court upon their rights and equities under the mortgage. If the court had passed its independent judgment upon their rights and equities, and had made a decree disposing of them accordingly, and if they had failed to supersede the decree, I do not see that they would have any reason to complain, even though they could not, in the event of a reversal, be placed, as to their rights under the mortgage, *in statu quo*. But in the absence of any real adjudication by the court, and by virtue of a consent decree, to which

Farmers' Loan and Trust Company v. Central Railroad.

they were not parties, to have the property in which they are interested disposed of, so that in the event of a reversal they cannot be awarded the very relief to which they would be entitled by the terms of the mortgage, would seem to me not at all in accordance with the principles of equity.

Again, it is impossible for us to know what the decision of the supreme court will be, and what complications may consequently arise from the execution of the decree in the meantime. Will the supreme court dispose of the case with reference to the fact that the decree below has been executed, and the trust property placed beyond judicial control; or will it determine the controversy with reference to the state of the case and property at the time when the decree was entered below? I confess I do not see the way clear in the future, if the *status quo* of the trust property be changed, as required by the terms of the decree. On the contrary, it appears to me that no complications can possibly arise if the decree be not executed. Nor can I see clearly that any special injury will result to the parties in interest by reason of the delay. If the majority feel aggrieved by the refusal of the court to grant their present motion, I suppose they have their remedy; they can apply for a mandamus, and thus submit their case to the judgment of the supreme court, and if it be a matter of right in them, and not of discretion in the circuit court, they can thus obtain redress. If the circuit judge feels any embarrassment in regard to the matter, he might consider the propriety of reserving his determination till the regular term in May.

The circuit judge concurred, and annexed to the above opinion of Judge LOVE the following:

DILLON, *Circuit Judge*.—1. I am of opinion that individual bondholders, not parties to the record, and who are represented by the trustee, have no legal right to demand that the trustee shall order a sale under the decree and have the same executed, if the trustee is of opinion that the interest of all the bondholders would be best subserved by not having a sale made pending the appeal.

Farmers' Loan and Trust Company v. Central Railroad.

2. The question whether a sale should be made under the decree pending the appeal is one which primarily belongs to the trustee to determine, having in view the interest of all the *cestuis que trust*. That question the trustee, by the petition, refers to the court. Under the circumstances, I am of opinion the court ought not to order the trustee to cause a sale to be made at the present time; such is also the opinion of Judge LOVE, hereto annexed, and in which I concur. An order can be made on the foregoing petitions in conformity with these views, and the special master will cause the order to be entered of record, and the respective counsel to be notified hereof. We decide the matter now, so as to enable the parties who desire a sale to apply to the supreme court, at this term, for a mandamus to compel the execution of this decree, if they shall so desire.

Afterward, and at the May term, 1877, the application was renewed by Alexander and others, original complainants and bondholders, and the following opinion was announced, reported by a short-hand reporter :

C. C. Cole, for the application.

Grant & Smith, *contra*.

DILLON, *Circuit Judge*, in orally denying the application to compel the trustee to sell the road under the decree, said :

Mr. Alexander and certain other bondholders apply here for an order on the trustee, the complainant in this case, in whose favor a decree was rendered, directing the trustee to sell the road under the decree of the court heretofore rendered. That matter has been very fully argued in favor of the application by Judge Cole, and the trustee appears by its attorneys of record and submits the matter on its part for the consideration of the court. This is in reality a renewal of a similar application which was made and considered by Judge LOVE and myself last winter, at chambers. At that time we denied the application, and decided it promptly, so as to enable the parties, if dissatisfied with our judgment in the premises, to apply to the supreme court for a

Farmers' Loan and Trust Company v. Central Railroad.

mandamus directing us to execute that decree. The facts are these, in brief: Originally, Mr. Alexander and certain other bondholders commenced this action of foreclosure in their own names, making the trustee a party defendant, on the ground that the trustee had improperly refused to execute the trust. Subsequently the trustee came in and was made complainant, and the case of the individual bondholders was consolidated with that one, and thereafter the cause was prosecuted in the name of the trustee, taking no notice of the rights of Mr. Alexander, or the other individual bondholders.

Under a railway mortgage, where it is contemplated that bonds to a large number will be executed and negotiated, and where the holders of these bonds may be scattered over the whole face of the earth, it becomes very important to appoint a trustee, and the trust deed for that purpose usually prescribes the powers and duties of the trustee; and it is so in this case. Now, all the purchasers of these bonds must take under the rights which that instrument gives them; and the effect of this is that the trustee, while acting in the line of his duty, and within the scope of his powers, is a representative of all the bondholders, so that when the trustee in this case procured a decree of foreclosure, he procured it for the equal benefit of all. The court cannot entertain the application of specific bondholders, except where they come in and represent and make a case, showing that the trustee is guilty of a breach of trust or neglect of duty. Such proceedings were had that the court ordered a decree of foreclosure for the trustee, for the benefit of all the bondholders. Subsequently two or three of the bondholders—Sage, Cowdrey, and Buell—were allowed an appeal to the supreme court, and the appeal was directed by Mr. Justice MILLER to operate as a supersedeas (3 Otto, 412).

Afterwards, in the supreme court, the supersedeas was set aside, but the appeal was entertained, and is still pending in that court. While that appeal is pending, an application was made to order the special master to make a sale of the road, which was considered by Judge LOVE and myself. That application was refused.

Farmers' Loan and Trust Company v. Central Railroad.

The parties went before the supreme court, on an application for a mandamus to compel us to execute the decree by a sale of the road under it, and that application was refused. We have not seen the opinion of the supreme court, if one was written, but Judge MILLER states to us distinctly that it was refused, on the ground that this trustee was the representative of all the bondholders—that it was for him to determine whether the best interests of all concerned would be promoted by a sale of the road, and that no single bondholder, nor any number of individual bondholders, had a *legal right* to insist upon an execution of the decree. And he says, furthermore, that the supreme court is very strongly of opinion that the individual bondholders ought not to be allowed to become parties to the record in railway foreclosure cases, unless upon strong and clear reasons, for good cause. Their number is legion. One may want this done, another may want that done; and such is the case here. The majority of the bondholders want a sale of the road, but a very large number in amount oppose that sale. Now, it is for the trustee to determine whether that sale ought to be made. And Judge MILLER also states that the supreme court is of opinion that, if these bondholders do not like the trustee, and are dissatisfied, their remedy is to apply to have him removed, under the provision in that behalf contained in the trust deed, and get a trustee to carry out their wishes, if they can.

So far as this case is concerned, we think that what the supreme court has decided is conclusive against the *legal* right of these parties now applying to have this decree executed; but at the same time we wish to say, for the guidance of the trustee, that there is no restraint in the decree, or in what has been decided in either court against its execution, and that the appeal does not supersede it, and that it is at perfect liberty, whenever it sees fit, to execute that decree. As far as the court is concerned, considering the trouble this road gives us by reason of the controversies and factions among the bondholders, we would be glad if the trustee could see its way clear to execute that decree, and would be glad if it could get the road out of court,

Farmers' Loan and Trust Company v. Central Railroad.

and into the hands of parties who could control it to their satisfaction.

As far as the suggestion is made that the trustee incurs any personal liability in so doing, we think there is nothing in that. It comes to this—and we want the trustee to understand that—as far as we can see, it incurs no personal liability by executing the decree. There is simply this question for the trustee to determine, viz., whether the interests of all the *cestuis que trust*, or bondholders, would be best promoted by now executing the decree, or by allowing it to stand until the determination of the appeal.

We are, therefore, obliged, in conformity with what we heretofore decided, and for the reasons here stated, and in conformity with the opinion of the supreme court, as we understand it through Mr. Justice MILLER, to refuse this application.

I have directed the short-hand reporter to take down the substance of what I have said, and send it to the trustee.

There is an application here by certain bondholders to remove the trustee, and the court will entertain that and consider it, if they take the steps necessary to that end.

LOVE, J., concurs.

NOTE.—Subsequently (August 31, 1877), Judge LOVE gave more at large the reasons for refusing to interfere with the discretion of the trustee, in respect to selling under the decree, pending the appeal in the supreme court. He said: "No one connected with the court has ever questioned the right of a party having a decree or judgment to have it enforced by execution; in other words, to have the fruits of his judgment or decree. Where the ordinary machinery of the court is sufficient to secure to a suitor the execution of his judgment, he has only to put that machinery in motion. Where the ordinary process of the court is inadequate to that end, the court, whether of law or equity, will undoubtedly give him the requisite assistance. But in the case now in question, it was perfectly competent for the complainant, the trustee, at any time after the vacation of the supersedeas granted by Judge MILLER, to proceed with the execution of the decree without any action whatever by this court. This is unquestionable; and it is equally beyond question that neither this court, nor any judge of it, ever opposed the least obstacle to the execution of the decree by the complainant

Farmers' Loan and Trust Company v. Central Railroad.

trustee. The court did refuse to order the trustee to proceed with the execution of the decree, but no order was necessary for that purpose. A thousand orders would not have added a scintilla of validity to the trustee's unquestioned right to execute the decree. No one ever denied or questioned its right to proceed. But when application was made to the court to order the execution of the decree, a very different question arose. The question then was, not whether the trustee had a legal right to proceed—which nobody questioned—but whether, under the then existing circumstances, the execution of the decree was a wise thing to be done? There was no necessity whatever for any order to have the decree executed. The bondholders, through their own chosen agents and trustees, had a decree which they could proceed to execute without the aid of the court. They had no right to ask the court to give them a power which they already possessed, in the most solemn form, by virtue of the decree itself. Nevertheless, the court might, by virtue of its power over all trusts and trustees, have ordered the complainants to proceed with the execution, though it would have been, in my judgment, an act of supererogation.

"But I have not the least hesitation in saying that, so far as I am concerned, I considered it unwise, under the circumstances of this case, to execute the decree pending the appeal in the supreme court. I am still of that opinion.

"I will briefly state the reasons which finally governed the court in refusing the application:

"Let it be remembered that the decree in this cause was not rendered upon the independent judgment of the court upon the rights and equities of the parties under the mortgage contracts. This court never did determine that the decree was one which the terms of the mortgage contracts warranted. The decree was presented to us as a compromise, to which all the counsel before the court, representing various bondholders, assented. As such, the court accepted it, and ordered it to be entered. We know that the parties themselves have a right to waive particular conditions in the mortgages, and, by consent, have a decree entered, which the court might not consider exactly consistent with the terms of the mortgages.

"But in time it came to the knowledge of the court that there were first mortgage bondholders to the amount of \$200,000 or \$300,000, who had not been represented in the litigation, and who did not assent to the terms of the decree. These dissenting bondholders asked and obtained leave to appeal to the supreme court of the United States, and they are now, with the express leave of that court, prosecuting their appeal. (3 Otto, 412.)

"Who does not see that there is more than ordinary ground to apprehend that a decree so entered may possibly be reversed? I trust it will not be, because I regard it upon the whole as equitable, and calculated

Farmers' Loan and Trust Company v. Central Railroad.

to promote the substantial interests of all parties. But since I cannot say that it was a decree which the mortgage contracts warranted, and since I know that the appellants were not heard in the court below, I cannot but apprehend that it may be reversed. Now, suppose the decree shall be reversed, and suppose in the meantime it shall have been executed by a sale and conveyance of the property to the complainants, who can foretell what complications may arise? It is proposed by the execution of this decree, not only to transfer the title of the mortgaged property to the complainants as execution purchasers, but to organize a new corporation to take the title, with power to issue a new mortgage and new stock, all based upon the title thus acquired. What will be the character of this title if the decree be reversed? Will the purchasers, who are none other than the very parties to the decree, take a good title as innocent purchasers, notwithstanding the reversal; or will they be held to be purchasers with notice? And, in this case, will their title be of any validity whatsoever, in the event of a reversal of the decree under which they have by their own acts obtained title.

"These are grave questions. It was not for us to decide them, when the application was made to us to enforce the execution of the decree. It is not for us to decide them now. But they were questions to be considered by us when it was our duty to determine whether it was a wise or unwise thing to order an execution of the decree by a reluctant trustee.

"It was certainly our duty, upon such an application, to consider what value capitalists would be likely to attach to the new securities, to be issued upon the basis of a title affected by the doubts suggested by the questions referred to. What credit would the new organization have, based upon this railroad property with a doubtful title? And would the end not be that the new organization, with the consent of the beneficiaries whom they represent, would, finally, in order to prevent a reversal, or avert the confusion and disorder which would result from it, be compelled to pay the appellants the amount of their bonds, with interest. In addition to those considerations, it occurred to me that no serious detriment could result to the bondholders by continuing the property in the hands of the receiver appointed by the court until the judgment of the supreme court could be obtained. It was within our own experience that all the roads which were under the control of receivers appointed by the court, had been operated and managed more economically, and with decidedly better results, than they had previously been by the agents of the railroad companies. Whatever may have been the cause of this result, it was a fact which had been a matter of general observation and remark. And the court had no reason to suppose that the management of the Central Iowa would prove an exception, nor do we believe it has proved an exception.

Farmers' Loan and Trust Company v. Central Railroad.

"Such were the views which influenced my judgment, in the conclusion that the court ought not to take the responsibility of ordering an unwilling trustee to execute the decree. I proposed to place no obstacle in the way of the trustee, and to utter no word of discouragement; but to leave him, and the parties whom he represented, to take the responsibility which belonged to them. They had full legal right to proceed without the authorization of the court. I did not myself propose to order, or even advise, a step which I considered to be, in its consequences, hazardous and unwise.

"The fact that the trustee did finally proceed with the execution without any order of the court, shows that none was necessary, and that the trustee had been at perfect liberty so to proceed after the discharge of the supersedeas granted by Justice MILLER."

THE FARMERS' LOAN AND TRUST COMPANY v. THE CENTRAL RAILROAD OF IOWA.

1. The pendency of an appeal from a final decree in equity, in which no supersedeas exists, does not deprive the court which rendered the decree from making proper orders to enable the party in whose favor the decree was rendered to have the same executed.
2. Construction of special provisions of deed of trust and decree as to re-organization of a new railroad company, where the trustee purchased the property of the former company under a foreclosure decree for the benefit of the bondholders.
3. Appeal from the order confirming sale granted, but supersedeas denied, under the facts of the particular case.

(Before DILLON and LOVE, JJ.)

Railway Mortgage Foreclosure.—Decree.—Sale.

THE cause came on August 31, 1877, on motion by the complainant to confirm the report of sale under the decree, by the special master, and upon exceptions by Mr. Cowdrey and others (3 Otto, 412) to that report; and upon motions for an order upon the trustee to convey the property to each of three competing companies, and upon the application of Cowdrey and others for an appeal from the order confirming the sale, and for a supersedeas.

Farmers' Loan and Trust Company v. Central Railroad.

Mr. Grant, Mr. Turner, and Mr. Cole, for trustee (plaintiff).

Mr. Cowdrey, contra.

DILLON, *Circuit Judge*.—We have considered the exceptions of Mr. Cowdrey and others to the master's report of sale, and are of opinion that they must be disallowed.

The plaintiff, notwithstanding the pending appeal, has a right to execute the decree—the supersedeas having been vacated. It was incidental to this right, which remains in this court, to make the order substituting "*The Public*" in the place of "*The Financier*"—more especially as the evidence produced before me when the order was made, showed the two newspapers to be the same—the change being one of name only. At all events, the object of the notice was publicity, and the requirements of the decree in this respect have been substantially complied with.

The other exceptions are based upon supposed errors in the decree. But while that decree remains unreversed, it must be accepted and treated by this court as correct. The master, in making the sale, has followed the decree. The exceptions to his report are overruled, and the motion to confirm the sale is granted, and the master is directed to execute a deed to the trustee, pursuant to the terms of the decree.

LOVE, J., concurs.

SAME CASE.

DILLON, *Circuit Judge*.—The several motions to order the property to be conveyed by the trustee to one or other of three new rival companies, must be denied, for the reason that, under the decree and the deed of trust, no evidence is before us "that the holders of a majority of the outstanding bonds secured by the first mortgage have, *in writing*, requested or directed," or assented to the articles of incorporation of either of said new companies. This written request or assent on the part of the present holders of said bonds to the articles of incorporation is expressly required by the deed of trust, and it is not changed by the decree. The decree and the deed of trust must be construed together.

Farmers' Loan and Trust Company v. Central Railroad.

This written request or assent must be produced either to the trustee or to this court or to the master, before either the trustee or the court is authorized to convey the premises to the new corporation. Such is the express requirement of the deed of trust. If the parties desire, we will appoint the master to act in this matter in the place of the trustee, and direct him to proceed without delay to ascertain whether a majority of the present holders of bonds have assented or shall assent in writing to the articles of incorporation. When that fact is reported to us, we will direct the trustee to convey the premises to it.

It is for the bondholders, and not the court, to determine what corporation or company is or shall be entitled to the property.

We see no substantial objection to the scheme proposed in the order submitted to us providing for the receiver's debts, but as this is dependent upon a conveyance to the new company, no absolute order in this respect can be entered at this time. We mention this now, so that the creditors and bondholders may be apprised of our views.

LOVE, J., concurs.

SAME CASE.

DILLON, *Circuit Judge*.—We allow an appeal as prayed by Mr. Cowdrey *et al.*, from the order confirming the sale, but are of opinion that this order cannot be superseded at this late day (the main decree of October, 1875, not being superseded), so as to prevent the master's deed from being executed and delivered.

LOVE, J., concurs.

NOTE.—Mr. Cowdrey and the appellants (see 3 Otto, 412) subsequently applied to Mr. Justice HUNT, of the supreme court, who allowed the supersedeas which the circuit court here denied; and the parties who opposed this appeal moved the supreme court to dismiss the appeal allowed by the circuit court and to vacate the supersedeas allowed by Justice HUNT; both of which motions the supreme court subsequently, January 7, 1878, overruled—the opinion not yet reported.

As to previous appeal allowed to Cowdrey and others in this case: see 3 Otto, 412. Previous decisions and orders in the cause: see 3 Dillon, 487; 5 Cent. Law Jour. 56; Western Jurist for July, 1877, p. 428.

Re Hazens.

Re JAMES HAZENS. (Petition of Edgell, Chamberlain, & Co.)

A creditor fully secured by attachment cannot, while holding on to his attachment, sustain, on the same debt, a petition to force his debtor into bankruptcy.

(*Before DILLON, Circuit Judge.*)

Bankrupt Act.—Attachment Creditor cannot force Debtor into Bankruptcy.

PETITION FOR REVIEW IN BANKRUPTCY. On July 25, 1877, Edgell, Chamberlain, & Co. filed a creditor's petition in bankruptcy against James Hazens, alleging that they were creditors of his in the sum of \$10,608.25, that he had committed acts of bankruptcy, and praying that he be adjudged a bankrupt.

On August 2, 1877, the debtor filed a plea that "he should not be declared a bankrupt, because the said petitioners are *secured* upon their said claim, for that on July 2, 1877, they brought an action by attachment in the state district court of Lee county, Iowa, against him, and on the same day attached a large amount of personal property, which the sheriff still holds under said attachment proceedings, which have not been dismissed, wherefore the petitioning creditors have no provable debt." To this plea the petitioning creditors demurred, on the ground that the plea did not show that they were secured creditors, or that their debt was not provable, or that they were not entitled to proceed in involuntary bankruptcy against their debtor. The district court sustained the demurrer *pro forma*, and the debtor brings the present petition to reverse that decision.

Joseph G. Anderson, for the debtor, Hazens.

Craig & Collier, for the petitioning creditors.

DILLON, *Circuit Judge*.—Upon the averments of the plea, it must be taken that the property attached fully secured the debt; and the question is whether an attaching creditor, thus secured, while his attachment remains in full force and effect, can sustain

Re Hazens.

a petition, founded on the same debt, to have his debtor adjudged a bankrupt. Under section 20 of the original bankrupt act (Rev. Stats. sec. 5075), the lien created by an attachment is preserved, and unless otherwise defeated, will remain until the proceedings in bankruptcy progress to an *assignment*, which, when made, has the effect *ipso facto* to dissolve the attachment, if the petition in bankruptcy was filed, as in this case, within four months of such attachment. (Rev. Stats. sec. 5044, sec. 14 original act; *Bracken v. Johnston*, *ante*, p. 581; S. C. 4 Cent. Law Jour. 9.)

After a careful examination of the various provisions of the bankrupt law as to the status and rights of secured creditors, under the act proper, and under the composition feature of the act, it is my opinion that a creditor who is fully secured is entitled to no agency or voice in the question whether the debtor shall be adjudged a bankrupt. That is a matter which concerns, and alone concerns, the unsecured creditors. If, however, a creditor is not fully secured, it is, I think, quite probable that, as to the excess of his debt over the value of the security, he is to be regarded as unsecured, and the court of bankruptcy, if this view is correct, has the power, if a contest arises, to determine, for the time being, as nearly as may be, the relative value of the debt and the security. Creditors who have effected a lien by attachment on *mesne* process are, while the attachment exists, to be considered as secured, since if proceedings in bankruptcy are not commenced within four months, or if, when commenced within that time, they do not proceed to an adjudication and assignment, the attachment lien continues in full force.

In the case under consideration, the lien created by the attachment was in existence when the petition in bankruptcy was filed, and the property attached was in the hands of the sheriff. *Non constat* that the bankruptcy proceeding will ever reach an assignment. It may be defeated for the want of a required quorum, by the failure to establish an act of bankruptcy, or, as has been held (*Re Shields*, reported *post*; *Re Scott*, 15 Bankr. Reg. 73, S. C. 4 Cent. Law Jour. 29; *Re Clapp & Co.* 2 Lowell's

Litchfield v. Johnson.

Decisions, 468), the attachment may continue by reason of the proceedings in bankruptcy resulting in a resolution of composition.

Under the circumstances set forth in the plea, it is my judgment that the creditors must be regarded as secured, and that they were not entitled, while holding on to the lien effected by their attachment, to force their debtor into bankruptcy. As strengthening this conclusion, the consideration may be adverted to that proceedings for the same debt by attachment and seizure of the debtor's property, and by a concurrent petition in bankruptcy, if not essentially hostile and repugnant, is oppressive to the debtor. Is it too much to require the creditor to elect which course he prefers to adopt, or wishes to pursue? If a warrant of seizure in bankruptcy should be issued, the property attached and held by the sheriff could not be taken from his custody, but would have to remain in his hands until the attachment was dissolved.

It is proper to add that, to secure uniformity of ruling in the circuit, I submitted the question here involved, with the arguments of the counsel, to Mr. Justice MILLER, who concurred in the conclusion reached, and in the general views herein expressed. (See *Paret v. Ticknor*, ante.) The judgment of the district court is reversed.

REVERSED.

EDWIN C. LITCHFIELD v. OLAF JOHNSON and LEWIS JOHNSON.

1. Settlers on what are known as the Des Moines river lands, in Iowa, may be entitled to the benefits given by the statute to occupying claimants when they have made valuable improvements on lands of which they are afterwards adjudged not to be the rightful owners.
2. The "occupying claimants" statute of Iowa, as to "color of title" and "good faith," construed.

(Before DILLON and LOVE, JJ.)

Litchfield v. Johnson.

Occupying Claimant.—Compensation for Improvements.—“Color of Title.”—Good Faith.

ON April 24th, 1874, Litchfield commenced an action of ejectment against the defendants for the south half of the south-east quarter of section 9, township 86, range 26, and at the May term, 1874, recovered judgment. Thereupon the defendants, under the statutes of Iowa, filed their petition as occupying claimants (Revision, sec. 2264, Code, sec. 1976), claiming to be allowed for improvements made by them on the land, under color of title, and in good faith. Issue was taken on this petition, and the case thus made was referred, by consent, to John N. Rogers, Esq., as referee, who, after hearing the evidence, found the following conclusions of fact and of law:

Conclusions of Fact.—The defendants entered upon and took possession of the land in question in the fall of the year 1866, having no claim or color of title thereto, but under the belief that said land was the property of the United States, and open to pre-emption, and with the intent to pre-empt the same, or to enter it under the homestead act, and they have ever since continued in such possession, holding adversely to all parties except the United States.

Under the belief aforesaid, they made improvements on said land, of which the present value is three hundred and seventy-five dollars (\$375). All of said improvements, excepting fifty dollars in value thereof, were made before the expiration of five years from the time when said defendants took possession of said land, and before they had acquired color of title thereto. Defendants have never acquired any color of title to said land otherwise than by virtue of their occupancy thereof for five years. The value of said land, aside from said improvements, is six hundred and eighty dollars (\$680). The value of the rents and profits of said land, aside from the improvements, during the time of defendants' occupancy thereof, is the sum of twenty-five dollars (\$25).

Litchfield v. Johnson.

Conclusions of Law.—1. Defendants had color of title to said land from the expiration of five years from the time when they entered on the same, and up to the beginning of this action, by virtue of their five years occupancy thereof.

2. The improvements were made by them in good faith.

3. The defendants are entitled to be allowed the value of their improvements as provided by the statute, including those made before they acquired color of title. This appears to me to be a very doubtful point or principle, and I am induced to hold thereon as above stated, chiefly because it is stated by counsel for defendants to have been so held by his honor, the circuit judge, in the case of *Lancaster v. Crouse*, in this court, and because, on examination of the papers in that case, including the instructions to the jury given and refused, it appears *probable* that such a view was then taken by the court, although it does not appear with entire clearness.

4. If the court should agree with me in the point last mentioned, then defendants are entitled to a judgment, ascertaining the rights of the parties, in conformity to the provisions of sections 1979–1981 of the Code of Iowa, on the basis of the findings hereinbefore contained, as to the value of the land, of the improvements, and of the rents and profits; that is, the amount to be paid defendants for their improvements should be fixed at three hundred and fifty dollars, being the present value of the improvements, less the value of the rents and profits of the land, as improved during its occupancy by defendants.

But if the court should be of opinion that defendants are not entitled to be allowed for improvements made before they acquired color of title, then the judgment should provide for payment to defendants of only twenty-five dollars on account of their improvements.

5. As nothing is provided by the statute in respect to a judgment for costs in favor of either party on such proceedings, I am of the opinion that each party must pay his own costs.

The plaintiff in the main action (Litchfield) excepted to this report, on the ground, first, that the evidence did not establish

Litchfield v. Johnson.

that the improvements were made in good faith; and for the reason, second, that the claimants cannot be allowed for improvements made during the first five years of their occupancy, but only for those made after the expiration of five years from the time they entered on the premises, and prior to the commencement of this action. On these exceptions the case is now before the court.

Wright, Gatch, & Wright, for the plaintiff.

Duncombe, O'Connell, & Springer, for the occupying claimants.

DILLON, *Circuit Judge*.—The amount involved in this particular case is small, but the case itself is important, as the principles of law which apply to it are decisive of a large number of like causes pending in the court.

1. The referee has found, as a fact, that the defendants, in the fall of 1866, entered on the land, the same being then vacant, under the belief that it was the property of the United States, open to pre-emption, with the intent to pre-empt it or enter it under the homestead act, and have ever since continued in possession, holding adversely to all parties except the United States. This finding of fact is sustained by the proofs, and supports the legal conclusion that the improvements were made "in good faith," within the meaning of the *occupying claimant statute* of this state.

The extent of the Des Moines river grant had, it is well known, been the subject of conflicting decisions on the part of the executive branch of the government, previous to the December term, 1866, of the supreme court, when the case of *Walcott v. The Des Moines River Company* (5 Wall. 681) was decided (which was after the defendant took possession of the land, and in respect of which the defendant, a foreigner, almost unacquainted with our language, testifies he knew nothing), and it was not until the December term, 1869, that the case of *Wells v. Riley* was determined, in which it was first held that the permission of the local

Litchfield v. Johnson.

land officers to occupants to prove possession and improvements, and to make entry of these Des Moines river lands under the pre-emption laws, was unauthorized and void. There is nothing in the history of this grant, whether legislative, executive, or judicial, which makes it impossible, or even improbable, that settlers upon these lands, prior, at least, to the final decision of *Wells v. Riley*, might not be such in good faith as respects the title held by the plaintiff. (*Wells v. Riley*, 2 Dillon, 566.)

2. But the principal question in the case is, whether, conceding the "good faith" of the claimants, they are entitled to be allowed for all valuable improvements made prior to the beginning of the ejectment suit, or only those made prior to that time, and after the expiration of five years from the time of entering on the land. The language of the statute giving the right of compensation to the claimant in this form, is, "where an occupant of land has color of title thereto, and in good faith has made any valuable improvement thereon, and is afterwards found not to be the rightful owner," he shall be entitled to pay, in the manner provided, for such improvements. It is insisted by the plaintiff, that to entitle the occupant to compensation for his improvements, "it must appear that they were made in good faith, *and* under color of title; in other words, color of title must concur, co-exist, with good faith at the *time* of making the improvements." Hence, as in this case color of title depends upon five years possession (Revision of 1860, sec. 2269), no improvements made during the five years, though made in good faith, can be considered, while for all that were made after the lapse of the five years, compensation may be allowed. The language of the statute above quoted is not free from ambiguity. The words used might be made to bear the construction contended for by the plaintiff. I have carefully considered the reasons for that construction, which were so ably urged by the plaintiff's counsel at the bar, and enforced with additional illustrations and learning in his printed argument, without being convinced that it is the necessary or true meaning of the statute. An equally natural meaning of the words used, is that the "color of title" must exist before

Litchfield v. Johnson.

and at the time when the suit of the rightful owner is brought against the occupant, in which case the occupant may be compensated for any valuable improvements made thereon in good faith, the statute prescribing no limitation as to the time when they were made. These remedial statutes are entitled to a fair and even liberal construction (*Longworth v. Worthington*, 6 Ohio, 10); and the view we adopt harmonizes with the evident policy of the legislature, as shown by the express provisions made by the legislature of Iowa to extend to the settlers "on any of the lands known as the Des Moines river lands" the rights given by the occupying claimant statute (Revision of 1873, secs. 1984, 1987).

We do not place our judgment upon the legislation last mentioned, since the improvements in this case were largely made before that time, although this legislation preceded, by several years, the suit brought to recover possession. It is by no means clear that the equities of an occupant who in good faith has made improvements during a period when the real owner was negligent in asserting his rights, may not be provided for by retrospective legislation, but it is not necessary to enter upon the consideration of that question, as, in my judgment, the claimant's case is embraced in the provisions of the general statute. (Revision, sec. 2264; Code, sec. 1976; *Society, etc. v. Pawlet*, 4 Pet. 480; *Albee v. May*, 2 Paine, 74; *Green v. Biddle*, 5 Pet. 381.)

The exceptions to the report of the referee are disallowed, and judgment will be entered in conformity therewith.

LOVE, J., concurs.

JUDGMENT ACCORDINGLY.

NOTE.—Mr. Justice MILLER, to whom the record and arguments in this cause were submitted, expressed his concurrence in the foregoing opinion.

Chapman v. Barger.

CHAPMAN v. BARGER.

The statutes of Iowa allow an "occupying claimant," who is an unsuccessful defendant in an ejectment suit, the right to retain possession of the land after judgment against him, until the value of his improvements (if made under color of title and in good faith) are ascertained, provided he files his petition therefor after judgment against him, but before the plaintiff causes the same to be executed, which petition must be filed in the main action. After judgment for the plaintiff in the main action, the defendant, under the Iowa statutes, filed his petition in the suit as an "occupying claimant," to have the value of his improvements ascertained, etc.; whereupon the plaintiff in the main suit filed his petition, under the act of congress of March 3, 1875, for the removal of the cause to the circuit court of the United States: Held, not removable, being a mere dependence upon the original suit.

(Before DILLON and LOVE, JJ.)

THIS cause was removed to this court by the plaintiff in the main suit (Chapman), under the act of congress of March 3, 1875. The defendant (the "occupying claimant") moves to remand it to the state court.

Mr. Hawley, for the plaintiff.

Duncombe & Springer, for the defendant.

DILLON, *Circuit Judge*.—Action of ejectment in state court, and judgment for the plaintiff. Under the Iowa statute relating to occupying claimants, the defendant filed his petition to be allowed for his improvements, in that suit, after judgment in favor of the plaintiff. After the petition of the occupying claimant for improvements was thus filed, the plaintiff in the main action filed his petition for removal of the cause under the act of March 3, 1875. We hold that the petition of the occupying claimant cannot be removed, as it is, under the Iowa statute, and decisions of the supreme court of the state, essentially part of and ancillary to the main suit. The main suit is at an end, and a judgment has been rendered therein in the state court. That judgment must remain in the state court. It cannot be brought

Balmear v. Otis.

here. The petition of the occupying claimant (whose rights are wholly statutory) is a dependence of the main suit, and cannot be separately removed. Under the legislation of Iowa in respect of occupying claimants, as construed by the state supreme court, and in view of the relief to which each party is entitled, it is apparent that the rights of the parties must be adjudicated in one and the same court.

CASE REMANDED.

NOTE.—The same question subsequently came before Mr. Justice MILLER and was ruled in the same way.

The construction of the Iowa "occupying claimant" statute: *Litchfield v. Johnson*, ante, p. 551; *Wells v. Riley*, 2 Dillon, 586.

HERMAN BALMEAR v. H. W. OTIS.

An action brought under the Iowa statute to quiet title, is, in its essence, an equity suit, and must be brought and heard as such.

(Before DILLON and LOVE, JJ.)

Statutory Suit to Quiet Title.—Jurisdiction.—Equity.—Law.

THIS was an action *at law*, under the Iowa statute, to quiet title. Demurrer to the petition on the ground that the remedy for the case stated in the petition was in equity.

Wright Gatch, & Wright, for the plaintiff.

Mr. Richards, for the defendant.

DILLON, *Circuit Judge*.—A proceeding under the Iowa statute to quiet title, is, in its essence, an equity suit. In the federal courts, whether a particular case is one at law or equity, depends upon the case stated in the petition. If the case there made shows a mere contest of legal titles, and the defendant is in possession, the remedy is at law.

Atlee v. Potter.

If the plaintiff is in possession, or if neither party is in possession, and the petition or bill shows that equitable relief is necessary or proper, the jurisdiction is in equity.

The statements of the petition in this case show that the case is equitable in its nature, and the demurrer thereto must be sustained. It must be heard as an equity suit, and not as an action at law.

DEMURRER SUSTAINED.

S. & J. C. ATLEE v. ORRIN W. POTTER *et al.*

1. The act of congress of March 3 1875, (section 3), requires the petition for the removal of causes from the state court to the circuit court to be made "before or at the term at which the cause could be first tried, and before the trial thereof." The Code of Iowa provides that *law* actions "shall be tried at the first term after legal and timely service has been made." *Held*, that this provision limits the time in Iowa at which the application for the removal of law actions, under the act of March 3, 1875, can be made.
2. Accordingly, an application in Iowa, by the defendants, for the removal of a law action which was not made at the return term, nor at the next term, when the defendants entered their appearance, nor yet at the next succeeding term, is not in time, under the act of March 3, 1875, although it was made at the term at which the answer was filed and the issues of fact completed.
3. In view of the specific provisions of the Code of Iowa, definitely fixing the time for the trial of law actions, the time for the removal, under the act of March 3, 1875, cannot be extended by the circumstance that in point of fact the issues are not made up at the first term. It might be different in the absence of statutory regulation as to what shall be the trial term.

(Before DILLON and LOVE, JJ.)

Removal of Causes.—Act of March 3, 1875.—Time for Removal.

ON MOTION to remand cause to the state court. The petition, which was *at law*, was filed in the state court November 25, 1875. At the August (1876) term of the state court, the de-

Atlee v. Potter.

defendants appeared and moved for a more specific statement of the cause of action. The motion was sustained, and the case continued. At the February term, 1877, the plaintiffs filed an amendment to their petition, and the defendants demurred, and at the same term the demurrer was overruled, and the cause went over. The defendants filed an answer in vacation, May 9, 1877. No replication was necessary, and the answer completed the issues. At the next term, viz., the August term, 1877, an application for removal to this court was made by the defendants, under the act of March 3, 1875, on the ground of citizenship, and the removal was ordered. In this court the plaintiffs move to remand the cause to the state court, because the application for the removal was not made in time.

Mr. B. J. Hall, for the motion.

Mr. E. S. Huston, *contra*.

DILLON, *Circuit Judge*.—This case was removed to this court by the defendants on the ground of citizenship, under the act of March 3, 1875. The only question presented is whether the removal was applied for in time. The application for removal was not made at the term at which the original notice was returnable, nor at the term at which the defendants entered their appearance, nor yet at the next succeeding term, but was made at the term at which the answer was filed and the issues completed. The action is one at law, and not in equity.

The Code of Iowa, in respect of the time of the trial of actions, contains the following provisions:

"SECTION 2744. Except where otherwise provided, causes *shall be tried at the first term* after legal and timely service has been made.

"SECTION 2745. The appearance term shall not be the *trial term* for equitable actions, except those brought for divorce, to foreclose mortgages, and other instruments of writing whereby a lien or charge on property is created, or to enforce mechanic's liens."

Atlee v. Potter.

Section 2744, *supra*, is the one which applies to this case, and it not being elsewhere otherwise provided, the cause was triable at the first term after due and timely service of the original notice (which stands in the place of a summons) had been made. It was therefore triable at the August term, 1876. The act of congress of March 3, 1875, requires the petition for removal to be made "before or at the term at which the cause could be first tried, and before the trial thereof."

The cause could, under the local statute above referred to, have been put at issue one or two terms before this was actually done, and it could have been tried, and under the Iowa statute it was triable, at the term at which the issues could have been made up. The provision of the Iowa statute which has been referred to, definitely fixing the term "at which the cause *could* be *first* tried," limits the time at which the application for the removal can be made. The time for the removal cannot be extended under the specific provisions of the Code of Iowa, by the circumstance that, in point of fact, the issues are not made up at the first term. A different rule might apply in the absence of any statutory provision as to what shall be the trial term.

The act of 1875 gives the right of removal to either party on the ground of citizenship, without requiring prejudice or other cause to be shown, and it was evidently the intention of congress, by the language quoted, to require the party to apply for the removal at the trial term, even if the cause should not be in fact put at issue, or be actually reached for trial at that term.

The effect of a removal, ordinarily, if not always, is to occasion delay, and it was to prevent this, as far as practicable, that this provision in the act of March 3, 1875, was enacted. Hence it gives the right to apply for the removal before the term, and requires that it shall be made, not simply before the time when the cause can be tried, but before or at the *term* at which the same can be *first* tried. Under the Iowa statute, the first term after due service is the trial term for *law actions*. In equity causes, with the exceptions specified, the first term is the appear-

Atlee v. Potter.

ance term, and not the trial term. In law actions the removal must be applied for at the trial term, whether the issues are then made up or not. This is all that it is now necessary to decide.

The conclusion we have reached has the merit of fixing a certain and definite rule as to the time in which the application for the removal of law actions in this state must be made. It has the added merit of preventing delay, which experience shows to be one of the ordinary abuses of the right of removal. It has, also, the further merit of preventing a party from experimenting with the state court by demurrers and motions, with a view to remain if the outlook is favorable, or to apply for a removal if that course offers a more hopeful prospect. Under the act of July 27, 1866, and March 2, 1867, both of which, as carried into the Revised Statutes (sec. 639), are probably yet in force, the removal may be applied for down to the time of final trial or hearing, but the right of removal thereunder is much more restricted than under the act of 1875, and there is more reason for the enlarged time than exists under the last named act, which extends the right to either party, simply for the asking, if the cause is one which is removable at all. The motion to remand is sustained.

LOVE, J., concurs.

CAUSE REMANDED.

NOTE.—As to the time in which *equity* suits in Iowa must be removed under the act of March 3, 1875: see *Palmer v. Call*, *post*.

As to the time in which application must be made, under the act of March 3, 1875, to remove suits pending when that act was passed, the following was decided:

BAKER v. PETERSON.

Removal of Suit under Act of March 3, 1875.—Time in which Application Must be made to Remove Suits Pending when that Act took Effect.—Informal Bond held Sufficient.

Per Curiam (DILLON and LOVE, JJ.)—Where, in a suit pending in a state court at the time of the passage of the act of March 3, 1875, the non-resident plaintiff applied to the state court, at the *first term* after

McCullough v. Sterling Furniture Company.

that act went into effect, for its removal, and his petition showed a case proper for removal, and his bond, with sureties, was accepted by the state court, and the removal ordered to the circuit court, in which latter court a copy of the record in the suit was duly filed by the plaintiff and his appearance entered as required—on a motion by defendant to remand the cause to the state court: *Held*—1. That the petition for the removal was in time, being filed before the trial and at the first term after the passage of the act of March 3, 1875. 2. That, although the condition of the bond for the removal was in conformity with the act of July 27, 1866, and omitted the condition required by the act of March 3, 1875, as to paying costs that may be awarded by the circuit court for a wrongful or improper removal thereto, yet, as the case was one proper for removal, and the bond had been accepted by the state court, and the record was filed and the appearance of the plaintiff in the circuit court entered in time, the omitted clause in the condition of the bond was not sufficient ground for remanding the suit to the state court.

Charles A. Clarke, for the motion.

Wright, Gatch, & Wright, opposed.

McCULLOUGH v. STERLING SCHOOL FURNITURE COMPANY.

1. An action at law in the state court was commenced by attachment, but no process was issued or served. At the next term the defendant, by consent, entered an appearance, and, by consent, also, the cause was continued and leave given to the defendant until the second day of the next term, to answer; all of which was contained in the same journal entry. The Code of Iowa provides that such actions "shall be tried at the first term after legal and timely service." At the term to which the cause was thus continued, a petition, under the act of March 3, 1875, for the removal of the cause to the circuit court of the United States was filed: *Held*, under the circumstances, that the application for the removal was in time.
2. If the entry of an appearance by the defendant had been general and unconditional, and at a term prior to the order for continuance, a different question would have been presented.

(*Before* DILLON and LOVE, JJ.)

McCullough v. Sterling Furniture Company.

Removal of Causes.—Act of March 3, 1875.—Time when Application must be Made.

ON MOTION TO REMAND. The defendant, an Illinois corporation, removed this cause to this court under the act of March 3, 1875, the plaintiff being a citizen of Iowa. The plaintiff moves to remand the suit because the petition for the removal was not made and filed in time.

The suit in the state court, which was an action at law, was commenced by attachment in December, 1876. No original notice (which, under the Iowa statute, takes the place of a writ of summons) was issued or served on the defendant. The next term of the state court was in January, 1877. At that term the defendant, by consent, entered an appearance, and at the same time, and likewise by consent, the cause was continued, and leave given to the defendant until the second day of the next term, to answer. The defendant's appearance, the continuance, and the order to answer at the next term, were contemporaneous, and are contained in the same journal entry. At the next term the defendant filed an answer and counter-claim; the plaintiff demurred thereto, which was not disposed of, and the plaintiff amended his petition; and thereupon, on the next day, and at the same term, the defendant filed its petition and bond in due form, to remove the cause to this court, and the removal thereof was ordered.

Mr. Blake, for the motion.

Mr. Tracy, *contra*.

DILLON, *Circuit Judge*.—The mode of making and the effect of an appearance by the defendant in an action, are regulated by the Code of Iowa of 1873 (sec. 2626). This was an action at law, and the Code (sec. 2744) provides that such an action "shall be tried at the first term after legal and timely service has been made." This case was not triable at the January term, 1877, because process had not been served.

McCullough v. Sterling Furniture Company.

The defendant may, however, enter a voluntary appearance, and such an appearance, if absolute and unconditional, has the same effect as to the power and jurisdiction of the court to proceed with the cause and the trial thereof, unless it *shall order otherwise*, as if original process had been served in time. But, as we construe the record of the state court, the appearance in this case was not general and unconditional, but it was the result of an agreement with the plaintiff's counsel to this effect: The defendant said to the plaintiff, "I will enter an appearance now, and thus save the expense of issuing and serving process, if you will consent that the cause shall go over to the next term, and that the answer shall be then filed;" to which the plaintiff agreed. Accordingly, the record of the state court shows that the defendant's appearance and the continuance of the cause were made at the same time and embodied in the same entry, which states that this was by consent of the parties. If the entry of appearance had been general, and at a prior time to the order for continuance, a different question would be presented. It is to be observed that, as the plaintiff had not served the defendant with process, he could not have forced the defendant to a trial, and the cause could not have been tried at the January term, except by the act or consent of the defendant, and the defendant did no act, and gave no consent, which made it legally possible to have tried the suit at that term. The action could not have been tried until the succeeding term, and at that term, and before the issues were finally completed, the application for the removal was made. Under these circumstances, it is our judgment that removal was in time.

LOVE, J., concurs.

MOTION DENIED.

NOTE.—As to *time* for the removal of suits, in Iowa, under the act of March 3, 1875: see *Atlee v. Potter*, *ante*; *Palmer v. Call*, *post*.

Palmer v. Call.

HENRY L. PALMER v. ASA C. CALL.

1. Under the Code of Iowa, equity suits are not triable at the appearance term, and such suits may, under the act of March 3, 1875 (sec. 3), be removed to the circuit court of the United States at the second term.
2. Under that Code, the same rule as to the time of removal applies to suits to foreclose mortgages, at least when there is no rule of court requiring such suits to be tried at the appearance term.

(Before DILLON and LOVE, JJ.)

Removal of Causes.—Act of March 3, 1875.—Time when Application for Removal of Equity Suits must be Made.

ON MOTION by plaintiff to remand cause to the state court.

This is a bill to foreclose a mortgage. The suit was brought in the state court, and at the return term, in February, 1877, the defendant filed "an answer, and, by consent of parties, the plaintiff has until July 7, 1877, to answer the interrogatories in the answer and to reply, and, by consent, the cause is continued." At the next term the defendant filed his petition and bond in due form, under the act of March 3, 1875, to remove the cause to this court—the plaintiff being a citizen of New Jersey, and the defendant a citizen of Iowa. The removal was ordered.

The plaintiff moves to remand the cause, on the ground that the application for the removal was made too late.

J. D. Springer, for the motion.

George E. Clarke and *Charles A. Clarke*, contra.

DILLON, *Circuit Judge*.—The act of congress of March 3, 1875, in respect of the removal of causes to this court from the courts of the states, provides that the application for the transfer shall be made "before or at the term at which the said cause could be first tried, and before the trial thereof." (Sec. 3.) The act extends equally to actions at law and suits in equity.

The Code of Iowa of 1873 provides when actions at law and

Palmer v. Call.

suits in equity shall be triable. (Secs. 2740-2745.) Law actions "shall be tried at the first term after legal and timely service of process has been made." (Sec. 2744.) The next section (2745) enacts that "the appearance term shall not be the trial term for equitable actions, except those brought for divorce, to foreclose mortgages," etc.

A previous section (2742) provides a mode of trying "equitable actions other than actions to foreclose mortgages, for divorce," etc., upon written evidence, if any party shall at any time during the appearance term move therefor. If no such motion is made, equitable actions, with the exceptions stated in the statute, may be tried at the next term, upon oral evidence taken in open court and upon depositions taken as in law actions. (*McClay v. Bunkers*, Iowa Sup. Ct. sess. April, 1877.) If tried in the latter mode, the provision of the Code is that the case goes on appeal to the supreme court as upon "legal errors duly presented." If tried in the former method, all the evidence goes to the supreme court, and the cause is there heard *de novo*.

The constitution of the state (art. 5, sec. 4) gives the supreme court appellate jurisdiction only in chancery, and makes it a court for the correction of errors in actions at law. It was one of the objects of the different codes of the state of Iowa, from the Code of 1851 to the Code of 1873, to assimilate, *as far as the constitution would permit*, the mode of pleading, procedure, and trial in actions at law and suits in equity. The constitutional provision did not allow the distinction between law and equity to be entirely abrogated, and the complicated provisions in the Code of 1873 (secs. 2740-2745), as to the modes of trial of law and equity suits, were devised to produce uniformity as far as it was supposed it was competent to do it. It was attempted to assimilate suits to foreclose mortgages, for divorce, etc., as to mode of trial and mode of review on appeal, to actions at law. (Secs. 2741, 2742, 2743.) The supreme court of the state has held that section 2742, as far as it attempts to provide that suits essentially of equitable cognizance shall at all events be heard in the supreme court on legal errors instead of *de novo*, is in conflict

Palmer v. Call.

with the constitution. (*Sherwood v. Sherwood*, 44 Iowa, 192.) It admits of doubt whether, under the constitution of Iowa, the legislature has the power to authorize the supreme court to hear chancery causes, on legal errors, as in law cases, or otherwise, than on appeal proper, that is, *de novo* on the proofs taken in the court below.

Suits to foreclose mortgages are in the nature of equitable cognizance (Code of Iowa, secs. 2509, 3319), and the practical, if not the necessary, effect of the decision in *Sherwood v. Sherwood*, will be to assimilate the mode of trial, or hearing, in mortgage foreclosures, to the mode of trying or hearing other equitable suits. Until the supreme court of the state shall decide that the plaintiff in a foreclosure bill can compel the issues to be made up and the defendant be forced to a final hearing at the first term, or the *nisi prius courts shall so provide by rule*, we shall hold, as respects the time for applying for a removal, that the appearance term is not the trial term in such a case, any more than it is in other equitable suits. (Sec. 2745.) The provision of this last section is that equitable actions generally shall *not* be tried at the appearance term. The object of this provision was, doubtless, that time should be given, if any party to the suit so elected, to take the proofs in writing. Another section of the Code provides that "no party shall be required to take depositions when the court is in actual session." (Code, sec. 3730.) The statute attempted to make an exception as to foreclosure suits, and to assimilate such suits to law actions as respects the mode and time of trial, proofs, and appeal. The legislature cannot, as we understand the opinion of the supreme court, constitutionally provide for a mode of trial in equity causes which shall absolutely deprive the parties of the right to have all the proofs taken in writing, so that on appeal a hearing may be had *de novo*. There is, therefore, no reason why, in a contested foreclosure case, the parties should not have the same time or opportunity to prepare for trial that is given in other equity causes. Undoubtedly, it is competent for the legislature to provide that foreclosure suits shall be tried at the first term;

Palmer v. Call.

but the provisions by which this has been attempted having, as to manner of final hearing on appeal, been held to be in conflict with the constitution, it would seem to us to be a reasonable, if not necessary, result of this, that if issues of fact are raised in a foreclosure case, they do not stand for trial at the appearance term, unless by consent, or, possibly, by virtue of a rule of court to that effect. "The exception found in section 2742, which forbids parties to divorce and other chancery actions, claiming a trial upon written evidence, must be regarded as of no effect." (*Per* BECK, J., in *Sherwood v. Sherwood*.) The constitutional right in a chancery cause to a hearing anew on appeal, appears to us necessarily to involve the right of either party, unless he waives it, to have the proofs taken in writing, or, if taken orally, to be reduced to writing on the hearing. In this respect foreclosure suits stand on the same footing as other chancery causes. It may be that section 2742 can have effect, so far as that the right to thus have the testimony taken in writing may be waived by not making the election at the first term to have it so taken, but in the absence of a rule of court, either party has the *whole* of the first term to exercise this election, and his failure to exercise it does not make the cause one which is triable at that term.

Such, at least, would seem to be the case where there is no rule of court to the contrary. It was manifestly the intention of the legislature to provide that where a cause was triable *de novo* on appeal, the appearance term should not be the trial term; but where, as in divorce and mortgage foreclosure suits, it provided that there should not be a trial *de novo* on appeal, then, as in law actions proper, the intention was that the first term should be the trial term. But, as in this latter classes of suits the constitution gives the right to a trial *de novo* on appeal, unless it is waived, we feel justified in holding, in the absence of a rule of court to the contrary, that the first term is not the trial term in equity suits where an issue of fact is made which requires the production of evidence. By the spirit, if not the letter, of the statute, either party has the whole term in which to make his election to have the testimony in writing (sec. 2742), a right which is inconsistent

French v. Burlington, etc., Railway Company.

with the proposition that the first term is the trial term, and a right which appertains, under the constitution, to foreclosure causes the same as to other equity causes, unless it is waived (if it is competent to waive it), by a failure to insist upon it at the appearance term.

There is some difficulty in construing and literally applying all the provisions of the Code on this subject, in consequence of the unconstitutionality, in part at least, of those provisions which relate to the mode of hearing on appeal, and possibly as to the mode of proof; but the conclusion we have reached gives a definite rule as to the time for the removal of all equity suits under the act of 1875, and has the merit and advantage of certainty and uniformity.

As an answer was filed at the appearance term and the cause continued by consent before the issues were completed, we hold that it was not too late to apply to remove the cause at the next term, no rule of the state court appearing which requires such causes to be tried at the first term.

LOVE, J., concurs.

MOTION DENIED.

NOTE.—As to the time in which application must be made to remove actions at law in Iowa, under the act of March 3, 1875: see *Atlee v. Potter*, ante; *McCullough v. Sterling Furniture Company*, ante.

FREDERICK TAYLOR *et al.*, Trustees, etc., v. THE BURLINGTON, CEDAR RAPIDS, AND MINNESOTA RAILWAY COMPANY.

In re petition of Wells, French, & Co. to establish mechanic's lien on the railway embraced in the mortgage of the railway company to the plaintiffs.

1. Under the legislation of Iowa, mechanics and material-men are entitled to a lien on railways for their work and labor.
2. Such lien dates from the commencement of the building of the railway, and is prior to a mortgage executed pending the building of the

French v. Burlington, etc., Railway Company.

railway, and before the particular work was done or materials furnished for which the lien is claimed.

- ∴ Under the legislation of Iowa, the relative rights and priorities of mechanics and mortgagees considered and determined.
4. Within what time mechanic's liens must be filed and enforced.

(Before DILLON and LOVE, JJ.)

Mechanic's Lien on Railways.—Relative Rights and Priorities of Mechanics and Mortgagees under the Legislation of Iowa.

THE plaintiffs in the main suit, Taylor *et al.*, are trustees in railway mortgages on the Burlington, Cedar Rapids, and Minnesota Railway Company. These mortgages include all existing and future to be acquired property of the company, including rolling stock, and rents, and income, and were executed and recorded before the work was done and the materials furnished by the intervening petitioners.

Prior to the execution of the mortgages the railway was projected and partially surveyed from Burlington to Plymouth (in the north part of the state), and about \$155,000 expended in grading and preparing the road-bed along different parts of the line.

The Muscatine division was purchased from another company, which had graded and tied about twenty-five miles thereof; after the purchase thereof by the Burlington, Cedar Rapids, and Minnesota Railway Company, to-wit, July, 1872, the latter company executed the mortgage thereon, which was duly recorded.

The main line was built in three divisions—the last being completed December 1, 1872—but all are and were designed to be one railroad, and all are included in the mortgage to plaintiffs, which was recorded after work was begun on the second division.

Wells, French, & Co., pending the foreclosure suit against the railway company, came into court and filed a petition setting up their claims and asking an order on the receiver to pay them. This petition was amended, asking to establish a mechanic's lien on the railroad for one span of a truss bridge over Mud creek,

 French v. Burlington, etc., Railway Company.

on the main line; for two spans of a truss bridge over the Iowa river, on the Muscatine division, and for forty coal cars. The dates and amounts of their claims are as follows:

1. For one span Howe truss bridge furnished for main line, over Mud creek, between Vinton and Cedar Rapids, February 24, 1874, amount due, \$ 1,404 50
With ten per cent interest from April 12, 1874.
2. For two spans Howe truss bridge over Iowa river, Muscatine division, delivered December, 1873, balance due December 4, 1873, 1,313 85
With ten per cent interest from that date.
3. For balance due on forty coal cars sold and delivered August 14, 1873, after payments and settlements up to November 1, 1874, 9,397 83
With interest at seven per cent from that date.
4. On April 1, 1875, all the above were thrown into one statement, on which, with added interest, there was then due to Wells, French, & Co., 13,108 04
5. On April 12, 1875, the railway company paid, . . . \$ 500
On May 1, 1875, same paid, 1000 1,500 00
Leaving general balance due, \$11,608 04

The last \$1,500 was applied on interest due and balance on first note for cars.

In respect to these Howe truss bridges, the parties agreed as follows:

That the span of Howe truss bridge of seventy-five feet, which was sold in 1874, was sold in lumber and iron in Chicago, and delivered there in separate pieces and put up across Mud creek, and iron put over it by the railroad company on the main line, on the division between Cedar Rapids and Waterloo, after the main line was finished and in operation, and was put up to supply the place of a bridge at the same place which was broken down or carried away by high water.

That the two spans of Howe truss bridge furnished in 1873, for the Iowa river, on the Muscatine division, were sold and delivered at the date named, in 1873, at Chicago, and placed in place by the railroad company, and iron and ties put over them

French v. Burlington, etc., Railway Company.

by the railroad company. That the said Burlington, Cedar Rapids, and Minnesota Railway Company purchased the Muscatine division when it was graded and tied for about twenty-five miles, of another railroad company, and placed the mortgage on that division, and recorded it, before the said Burlington, Cedar Rapids, and Minnesota Railway Company commenced any work on the division, but after it was graded by the other company.

The date of delivery of the span over Mud creek, was on the 24th day of February, 1874.

The date of the delivery of the two spans over the Iowa river, on the Muscatine division, was on the 26th day of December, 1873.

The contract to furnish forty coal cars is in writing, dated August 3, 1873, and the cars were sold and delivered without any condition, and this contract was made and the cars delivered long after the main line of the railroad was completed.

On November 9, 1875, Wells, French, & Co. filed statements for liens in Benton and Johnson counties for the bridges, and on November 18, filed statement in Linn county for balance due on cars.

On December 14, 1875, Wells, French, & Co. filed amended petition to enforce and establish these liens, and claimed and prayed a lien on the whole road for each amount.

December 28, 1875, the trustees answered the petition, setting up the statute of limitations against the lien, and averring that Wells, French, & Co. were not entitled to a lien as against the mortgage.

The question is, whether Wells, French, & Co. are entitled to a mechanic's lien for all or any part of these claims, and if so, whether it is prior or subsequent to the lien of the mortgages.

The provisions of the statute upon which this question depends, are mainly sections 2130, 2137, 2139, 2140, 2141, 2143, 2510, and 2539 of the Code of Iowa of 1873, which, so far as material, are referred to in the opinion of the court.

Hubbard & Deacon, for Wells, French, & Co.

James Grant, for railway mortgage trustees.

French v. Burlington, etc., Railway Company.

DILLON, *Circuit Judge*.—In the various railway foreclosure cases in this court, there are probably forty intervening petitions filed seeking to establish, on behalf of the claimants, mechanic's lien on the property covered by the railway mortgages. The trustees, in these mortgages, resist the right to any lien whatever, in many cases, and particularly resist the establishment of a mechanic's lien in any case where the labor was done, or the materials were furnished, after the recording of the mortgage, which shall have priority over the mortgage. There are also questions as to the lien for repairs after the road has been completed, as distinguished from the right to a lien for original construction; and questions, also, as to limitation of the lien of the mechanic.

The most important of these questions are presented in the case of Wells, French, & Co., and that has, therefore, been selected as the one in which to state the conclusions at which the court has arrived. In many respects nothing is more unlike than the erection of an ordinary building and the construction and equipment of a line of railway, and much of the difficulty in construing the legislation of the state has arisen out of the grouping of the two by the legislature and making an uniform or single provision for both. The duty of the court is to feel its way to the legislative intent and give that intent effect as far as it may. Wherever the statute has been construed by the supreme court of the state, that construction will be accepted as a rule of decision by this court. While we have considered every decision of the state supreme court which bears upon the questions before us, and also the full and exhaustive discussions of counsel, it is not proposed to go into an elaborate exposition of the different provisions of the statute, but mainly to state the results to which our examination has brought us.

The mechanic's lien statute (Code, secs. 2130, 2132) extends, *inter alia*, to all persons "who construct or repair any work of internal improvement," including railways, and gives a lien "for labor done, or materials, machinery, or fixtures furnished," upon "such building, erection, or improvement, and upon the land belonging to the owner, on which the same is situated." (Sec. 2130.)

French v. Burlington, etc., Railway Company.

Another section provides for the filing of the claim with the county clerk within ninety days after the work is done, and declares what shall be the effect of a failure to file. (Sec. 2137.)

Section 2139 first provides for the priority of mechanic's liens as among themselves, making the same depend upon the order of filing, and then proceeds to exact that such liens "shall be preferred to all other liens and incumbrances which may be attached to or upon such building, erection, or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection, or improvement." The lien extends to the entire land to the extent of the interest of the person for whom the mechanic did the work or furnished materials, and to a leasehold interest, as to which the provision is that the forfeiture of the lease shall not impair the mechanic's lien as to the buildings, but the same may be sold to satisfy the lien and be moved off within thirty days after the sale. (Sec. 2140.)

Section 2141 provides for still another case in these words: "The lien for the things aforesaid, or work, shall attach to the buildings, erection, or improvements for which they were furnished or done, in preference to any prior lien, or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien, may have such building, erection, or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter." (Sec. 2141.) The suit to enforce a mechanic's lien must be in equity. (Sec. 2510.)

We hold as follows:

1. Section 2139 contemplates and provides for a case where, at the time of the commencement of the building or railway, there is no recorded lien or incumbrance thereon, and where such lien or incumbrance is created subsequent to the commencement of the building or railway; in which case the mechanic has a lien which relates back to the commencement of the building or railway, although the particular work of that mechanic was done, or his materials were furnished, after a mortgage was recorded, or lien created.

French v. Burlington, etc., Railway Company.

As to an ordinary building, the proposition just stated admits of no doubt; indeed, it has been expressly decided to be correct by the supreme court of the United States, in respect of an enactment copied from the Iowa statute. (*Davis v. Bisland*, 18 Wall. 659.)

As to the application of this principle to railways, the decision of the supreme court of Iowa is conclusive. (*Neilson v. Iowa Eastern Railway Company*, September term, 1876, 10 Western Jurist, 604; S. C. 44 Iowa, 71.)

Construing section 1853 (the same as sec. 2139 of the Code of 1873), it was decided, in the case last cited, that the lien of the mechanic dates from the commencement of the railway, treating it as an entirety, and has priority over a mortgage executed after the work of constructing some portion of the railway has been commenced, and before the particular work was done, or materials furnished, for which the mechanic's lien is claimed.

2. Section 2141 makes provision for a still different case. This section contemplates and provides for a case where there is a mortgage, lien, or incumbrance upon the land prior to the time when the owner commences "a building, erection, or other improvement thereon." What, then, are the relative rights of such prior incumbrancers and the mechanic? This is plainly determined by the section itself. As to the land, the mortgage is declared to retain its priority; but as to the buildings, erections, or improvements put upon the land subsequent to the mortgage, the mechanic has priority over the mortgage—may enforce his lien accordingly, and have the building, erection, or improvement sold on execution, and remove the same within a reasonable time.

The mechanic has, in such a case, the same right as against the mortgagee that he has as against the lessor under the preceding section.

This view, to the extent just stated, is in accordance with the decision of the supreme court of the state, in *Gelchell v. Allen*, 34 Iowa, 559, which case, so far as it relates to an "independent erection on the land," is undoubtedly correct, and is approved,

French v. Burlington, etc., Railway Company.

at least to this extent, by the same court in the subsequent case of *Neilson v. Iowa Eastern Railway Company*, *supra*.

3. But suppose the prior mortgage attaches not only to land, but to a completed house, or other erection or improvement thereon, and the house or other improvement is repaired by the mechanic, at the instance of the owner—what, then, are the relative rights of the mortgagee and the mechanic? This was the question which gave so much trouble to the state supreme court, as will be seen by reference to *Getchell v. Allen*, and the first opinion of that court in the *Neilson* case. Under section 2130, undoubtedly the mechanic has a lien for repairs to a building erected and completed before the repairs were begun. That section uses the word “repairs,” and reparations by a mechanic are within the remedial purpose of the legislature. But when does such lien attach, and how is it to be enforced? As against the owner, the lien attaches from the time the repairs are begun. This is plain enough, and just. But when does this lien attach as against a prior mortgage of land and building? The answer is, at the same time it attaches as against the owner. The result is that repairs on a previously completed building or railway on which a mortgage rested prior to the commencement of such repairs, do not give a lien which will override the lien of the mortgage. The legislature has not authorized the owner of a building or railway, on which such owner has given a mortgage, to improve the mortgagee out of existence by making repairs *ad libitum*, and furnishing the owner the necessary credit therefor, by giving the mechanic and material-man a lien paramount to the mortgage. Such a view has neither law, justice, equity, nor public policy to recommend it. This conclusion accords with the opinion of the supreme court on this point in one branch of the case of *Getchell v. Allen*. To such a case section 2141 of the Code does not apply—that section only applying to cases where the lien of the mechanic is sought with respect to improvements which were not on the land when the prior mortgage was taken, and on the security of which the mortgage did not rely.

Suppose a lessee improves the house of the lessor, it would

French v. Burlington, etc., Railway Company.

hardly be contended, under section 2140, that the mechanic could sell the whole house under his lien, and move it away. Nor, under section 2141, can he do this with respect to a building covered by a prior lien. The provisions and purpose of the two sections, in this regard, are the same.

Where there is a prior lien on the building or railway, these once having been completed, and a mechanic subsequently does work, or furnishes materials, he has a lien, but a lien subordinate to the mortgage, and which must be enforced as such, and it is accompanied with no right of removal. This view accords with the language of the statute and with its policy, and leads to just results. Any other view leads to confusion and injustice.

Applying these principles to the case of Wells, French, & Co., the result is this:

1. As respects the bridge furnished in 1874, after the execution of plaintiffs' mortgage, and after the road had been completed, to replace a bridge which had been carried away, any lien which it would be possible to get therefor would be subsequent to the mortgage.

2. The same principle applies to the coal cars furnished in 1873, even if it were conceded that there was a lien upon a railroad for cars furnished to use thereon, which is at least doubtful. (*New England Car Company v. Baltimore and Ohio Railroad*, 11 Md. 81.)

3. As to the two spans of bridge furnished in December, 1873, for the original construction of the Muscatine division, the petitioners are entitled to a lien, if they have complied with the provisions of the statute in respect to filing their claim and bringing suit to enforce it. (Code, secs. 2137, 2138, 2529.) As these were delivered December 26, 1873, the case falls within the Code of 1873, and not the Revision of 1860.

Under the Code of 1873 (sec. 2137), the mechanic may file his lien within ninety days, etc., "but a failure to file the same within the time aforesaid shall not defeat the lien except against purchasers or incumbrancers in good faith without notice, whose rights accrued after the ninety days and before any claim for the lien was filed."

Union Rolling Mill Co. v. Burlington, etc., Railway Co.

"Actions to enforce a mechanic's lien must be brought within two years from the time of filing the statement in the clerk's office." (Sec. 2529.) The two bridge spans in question were delivered December 26, 1873; statement for lien filed November 9, 1875, and the petition filed to enforce and establish the lien December 14, 1875, which was within the two years. As against the railway company, the failure to file the statement for a lien does not defeat the lien, and there are no incumbrancers or purchasers whose rights accrued after the ninety days and before the same was filed. The supposed defect in the statement, if not cured by the stipulation, is not of such a nature as to defeat the lien. For the amount due for these two spans, \$1,313.85, with interest, the petitioners are entitled to a lien prior to the mortgage.

LOVE, J., concurs.

DECREE ACCORDINGLY.

In re intervening petition of the Union Rolling Mill Company.

DILLON, *Circuit Judge*.—At a period distinctly after the railroad was finished, and had long been operated, the rolling mill company "furnished to the railway company (in April, June, August, and December, 1874), iron and steel rails for the repair of their lines of railway; which rails were placed in their said railway, and have ever since been and are now used as part of the track thereof." The mortgages were recorded years before.

This petition raises the single question whether a lien exists, under the mechanic's lien statute, for repairs to a railway previously completed and in operation, which is superior to the lien of a mortgage made and recorded before the repairs but subsequent to the original commencement of the work of constructing the railway.

This question is covered by the principles laid down in the case of Wells, French, & Co. The petitioners have a lien, but it is subsequent to the mortgage. The result would have been different if the rails had been furnished for the original or first construction of the road.

LOVE, J., concurs.

United States Wind Engine Co. v. Burlington, etc., Railway Co.

In the matter of the intervening petition of the United States Wind Engine and Pump Company.

The material facts are, in brief, as follows:

1. Between April 14, 1870, and March 5, 1875, intervenor sold and delivered to the Burlington, Cedar Rapids, and Minnesota Railway Company, wind engines and fixtures to the value of \$11,137.17, of which has been paid \$7,167.43, leaving balance due \$3,969.74—\$2,626.02 bearing interest at ten per cent, and \$1,343.72 bearing interest at six per cent—as shown by agreed statement, and from dates there given.

2. They were all sold under a verbal agreement “that the title to the engines should not vest in the railway company till paid for.” It was, of course, not recorded.

3. December 6, 1875, petitioner (United States Wind Engine and Pump Company) filed its petition asking payment from the receiver for the balance due, or the right to remove the engines, etc., or other relief; and on same day the trustees in the railway mortgages filed answer averring that the agreement for title was not good, because not recorded, as required by act of 1872 (Code, sec. 1922), and averring title in the railway company, and through it were subject to the mortgage, etc.; and on same day a general replication was filed.

4. April 5, 1876, intervenor amended, by leave of the court, and claimed mechanic's lien on entire road, etc., under statements for liens filed in all counties where engines were situated, on March 27 and 28, 1876.

May 1, 1876, the trustees answered, claiming priority for their mortgages, denying intervenor's right to a lien, because not filed within one year after the last engines were sold, and because they were no part of the construction or repairs of the road. May 6, 1876, replication filed.

The amount due petitioner was not disputed. The parties stipulated as to the facts.

Hubbard & Deacon, for the petitioner.

James Grant, for the trustees in the railway mortgages.

United States Wind Engine Co. v. Burlington, etc., Railway Co.

DILLON, *Circuit Judge*.—The petitioner, on December 6, 1875, filed its petition to recover out of the fund in court, or have returned to them certain wind-mills, and articles supplied to repair the same, furnished on and since November 30, 1873. The petition alleges that pumps and engines had been furnished before that, but all that were furnished prior to November 15, 1873, had been paid for. It alleges that said mills and fixtures were furnished to said railway company by virtue of a "verbal agreement that they were to be paid for in monthly installments, and the wind company were not to relinquish their title until they were paid; and it was expressly understood, in case of default the plaintiff should have the right to take and remove the mills and fixtures" (see the first bill). The defendant answered, denying the agreement as to title, and averring that said contract was not in writing, acknowledged and recorded, and could not be enforced. Upon the coming in of this answer, the plaintiff, on the 21st of March, 1876, filed a mechanic's lien claim, and amended its bill, claiming alternatively a mechanic's lien, not only for the wind-mills and pumps, but for the supplies and repairs of the same. The right to a mechanic's lien is denied by an answer filed to the amended petition. The material stipulation in the agreed facts is as follows: "An agreement or understanding existed between the United States Wind Engine and Pump Company and said railway company that the title to all the property delivered should not vest in the railway company until paid for; but said agreement was not in writing, and was never recorded."

The petitioner asks alternative relief.

1. They claim that effect should be given to the verbal agreement as to the title remaining in the petitioners until payment for the engines was made. The answer of the trustees is that the agreement not being recorded, it cannot avail as against them without notice of it. All the engines delivered before November, 1873, have been paid for. It is those delivered after that date that are in controversy. If regarded as realty, the recording statute would give the priority to the mortgagee without

United States Wind Engine Co. v. Burlington, etc., Railway Co.

notice. If personal property, the act of 1872 (Code, sec. 1922) declares the condition as to retaining title invalid against creditors without notice, unless the investment be in writing and recorded. It was neither in writing nor recorded. Nor is it shown that the trustees in the railway mortgage had notice thereof. It is not stated in the stipulation when the agreement as to title remaining in the seller was made, but as engines were sold from time to time, beginning in April, 1870, it is argued that the agreement must have been made prior to that time, and hence it was a continuing agreement, antedating the statute, and hence, under our decision in the Haskell & Barker Car Company case, it need not be recorded. But in that case there was an agreement in writing prior to the statute, and specifically relating to the cars in dispute. In this case it is not shown that, prior to the statute of 1872 (Code, sec. 1922), the parties made a contract which bound the petitioners to furnish and the railway company to receive the engines now in dispute, viz., those delivered after November, 1873. The statute (sec. 1922), therefore, applies, and must have effect if the trustees in the railway mortgage are "creditors" of the railway company within the meaning of the section.

The railway mortgages, under which the trustees claim, were made and recorded prior to the delivery of the engines here in question. The statute of the state authorizes railway companies not only to mortgage their existing property, "but also property, both real and personal, which may thereafter be acquired, and shall be as valid and effectual for that purpose as if the property was in possession at the time of the execution thereof" (Code, sec. 1284); and the recording thereof "shall be notice to all the world of the rights of all parties under the same" (Code, sec. 1285).

The railway mortgages were executed and recorded prior to the delivery of the engines not paid for, and cover all after-acquired property pertaining to the railway. These engines are on the right of way, are essential to the use of the railway, and are part of it. They fall within the property embraced in the

United States Wind Engine Co. v. Burlington, etc., Railway Co.

mortgage. But it is claimed that, as to after-acquired property, the mortgagee must take it *cum onere* (*United States v. New Orleans*, 12 Wall. 362); and as the stipulation as to title being retained by the seller is good between the parties, it is likewise good as to the mortgagee or trustees. Treating these engines as in the nature of personalty or removable fixtures, I am inclined to think, aside from the requirements of section 1922 of the Code, that this position would be sound. But the mortgagees are creditors of the railway company, and such verbal unrecorded agreements are declared to be invalid against "any creditor" (prior or subsequent) without notice, and are probably ineffectual as against the trustees in the railway mortgage in actual possession under the mortgage.

2. As to the claim for a mechanic's lien, section 2129 of the Code enacts that "no person shall be entitled to a mechanic's lien who takes collateral security on the same contract."

It is admitted that, for the purpose of securing payment, the vendors made a contract to retain the title. This would be good between the parties, and would be good against creditors if it had been reduced to writing, acknowledged and recorded.

A seller who undertakes to secure himself in this specific way, showing that he does not rely upon the lien given by the statute to the mechanic or material-man—a way inconsistent in its nature with a right to a lien under the statute—takes "collateral security" within the meaning of the statute, and hence is not entitled to a mechanic's lien.

LOVE, J., concurs.

PETITION DISMISSED.

Smith v. Woodworth.

SARAH A. SMITH v. W. C. WOODWORTH, Executor, etc., *et al.*

1. The statute of Westminster 2, 13 Edw. 1, ch. 34, making adulterous elopement of the wife a bar to dower, is not in force in Iowa, being inconsistent with the legislation of the state in relation to the descent of property, dower, and adultery.
2. The special verbal contract between the wife and husband, set out in the plea, in respect to release of dower, *held*, on demurrer, not to bar her action for dower, or the statutory substitute therefor.

(Before DILLON, Circuit Judge.)

*Dower.—Adultery.—Divorce.—Statute of Westminster 2,
13 Edw. 1, Ch. 34.*

THE plaintiff claims to be the widow of W. K. Smith, who died in Iowa, without issue, in 1872, leaving real and personal property, which he devised and bequeathed to others. This is an action originally brought, in 1873, in the circuit court of the state, claiming, under the statutes of Iowa, her share, as such widow, in the property of the said Smith. The defendants insisted that the rights given the plaintiff in the real estate were in the nature of dower, being the statutory substitute therefor, and that such rights were to be governed by the rules of law applicable to the estate in dower. The suit was removed to this court under the act of congress in that behalf. The marriage, seizin, and death are admitted. The defendants—the executor, devisees, and legatee of the husband—plead in bar as follows:

1. A decree of divorce, granted at the instance of the plaintiff, to which there is a replication, setting up that said decree was obtained by the procurement of the husband, without the knowledge or consent of the wife (the present plaintiff), and averring that she never knew of the divorce proceeding or decree until after his death. This decree was granted in Illinois, in 1860, the parties being then domiciled in that state. No question is made upon the sufficiency of the replication.

2. The defendants plead specially in bar the following:
“That, on or about the 1st day of July, 1859, the plaintiff, be-

Smith v. Woodworth.

ing then the wife of said William K. Smith, did, of her own consent, leave the house and home of the decedent, and thereafter lived separate and apart from said William K. Smith, deceased, until his decease, in about the year 1872. Defendants aver that, within that period, without the consent of her said husband, the plaintiff committed many acts of adultery with persons unknown; and did, in particular, reside with and commit frequent adultery with one Freeman Miller; and did reside with for a long time, and hold adulterous intercourse with, one Charles Clinton; thereby forfeiting her right of dower, maintenance, and allowance as a wife. Defendants aver that at no time after the adulterous intercourse of plaintiff with him, the said Freeman Miller, and him, the said Clinton, and others, was the deceased, William K. Smith, reconciled to the plaintiff."

3. The defendants plead specially in bar the following: "That, sometime in the year 1860, in the county of Fulton, Illinois, the plaintiff had been guilty, during the existence of the marriage relation, of the crime of adultery, without the consent of her husband, the deceased William K. Smith, and the same had been discovered by said deceased; and thereupon, and shortly thereafter, the said plaintiff and said deceased, intending a final separation, and *having been lawfully divorced*, and the said parties agreeing to a separation for life, they contracted and agreed upon a sum of three hundred dollars to be paid plaintiff by deceased, in lieu of, and full satisfaction of, plaintiff's right of dower, support, and allowance, and all interest in and to any property the deceased had or might have. Defendants aver that said settlement was had, and payment of said money was made to plaintiff, in good faith, and without oppression; that it was fair and reasonable in all its parts, and was accepted by plaintiff in full of the rights now again demanded. Defendants also aver that decedent at that time had but little property, and the said sum of money constituted a very considerable portion of his estate; the said sum was all, and more, than plaintiff was legally or equitably entitled to."

To the second and third pleas above, the plaintiff demurred, for insufficiency in law to bar her right of dower.

Smith v. Woodworth.

In relation to the second plea above, viz., the plea of adultery, the following legislation of the state of Iowa has a bearing upon the subject: In 1853 (see Revision 1860, sec. 2477), it was enacted that "one-third in value of all real estate in which the husband at any time during the marriage had a legal or equitable interest, and to which the wife has made no relinquishment of her rights, shall be set apart as her property, *in dower*, upon the death of the husband, if she survive him; said estate in dower to be and remain as at common law."

In 1862 (Laws 1862, p. 173), the above provision of 1853 was repealed, and the following substituted therefor: "One-third in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, which has not been sold on execution or other judicial sale, to which the wife has made no relinquishment of her right, shall, under direction of the court, be set apart by the executor, administrator, or heir, *as her property in fee simple*, on the death of the husband, if she survive him." "The above provision, in relation to the widow of a deceased husband, shall be applicable to the husband of a deceased wife. Each is entitled to the same right of dower in the estate of the other; and the like interest shall in the same manner descend to their respective heirs. The estate by courtesy is hereby abolished." This statute, among other changes, drops the word "dower," and substitutes the words, "*as her property in fee simple*," and *omits* the clause in the act of 1853, "said estate in dower to be and remain as at common law." The act of 1862 was the law in force when Smith died, in 1872.

Under the legislation of Iowa, the dower right is relinquished by executing a conveyance, or by relinquishing it in a conveyance, in the execution of which she joins with her husband. (Revision 1860, secs. 2215, 2255.)

Divorces from the bonds of matrimony may be decreed at the instance of the injured party, for the adultery of either the husband or wife, committed subsequent to the marriage. (*Ib.* secs. 2534, 2536.) And "the court, when a divorce is decreed, may make such order, in relation to the property of the parties and

Smith v. Woodworth.

the maintenance of the wife, as shall be right and proper." (*Ib.* sec. 2537.)

Adultery may be punished criminally, but only on the complaint of the injured husband or wife. (*Ib.* sec. 4347.)

The legislation of Iowa is silent as to the effect of the adultery of the husband or wife upon the property rights of either, or upon the right to dower. The common law of England, wherever applicable to our condition, and not inconsistent with the legislation of the state, prevails in Iowa; so held, in a case relating to dower, by the supreme court of the state. (*O'Ferrall v. Simplot*, 4 Iowa, 381.)

H. C. Henderson, for the plaintiff.

H. E. J. Boardman and *W. M. Stone*, for the defendants.

DILLON, *Circuit Judge*.—In respect to the *second* special defence to the action, I am of opinion that the statute of Westminster 2, 13 Edw. 1, ch. 34, upon which that defence is based, and which is: "If a wife willingly leave her husband, and go away, and continue with the adulterer, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon, except that her husband, willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action"—never having been expressly adopted in Iowa, is not in force therein, nor is it part of the law of the state. The ground of this conclusion is that its provisions are inconsistent with the legislation of the state on the subject of dower, or the widow's right in the estate of her husband, and the mode in which such right may be barred or relinquished, and with the statutory provisions in respect to divorce on the ground of adultery. The reasons which support this conclusion, under similar legislation, are so forcibly stated by the supreme judicial court of Massachusetts, in *Lakin v. Lakin*, 2 Allen, 45, that I content myself with a reference to that case, and to *Bryan v. Batcheler*, 6 Rh. Is. 543, and *Lecompte v. Wash*, 9 Mo.

In re Shields.

551, without here setting forth the arguments upon which they rest. This conclusion concedes that the fee simple provision for the widow made by the act of 1862, which is a substitute for dower, is governed by the same principles as to forfeiture that apply to the right or estate in dower; but the point need not be decided, for the concession is the view most favorable to the defendants. Under the act of 1862, the rights of husband and wife in the estate of the other are reciprocal and the same; and it would hardly be contended that the statute of Westminster would apply to deprive the *husband*, who had committed adultery, of his right to one-third of the estate of his wife.

As respects the *third* special defence, I am of opinion that the verbal transaction therein set forth does not amount to a relinquishment, or legal bar, to dower or the widow's right; and, in view of the allegation that there had been a valid divorce, which, of itself, would be a bar to dower, and the prospective nature of the alleged release, this transaction is not of such a nature, whatever might be its effect in equity, as to amount to a bar to this suit. (See *McKee v. Reynolds*, 26 Iowa, 578, and cases cited.) Both pleas are insufficient.

DEMURRER SUSTAINED.

In re SHIELDS.

Where an involuntary petition in bankruptcy is filed against an alleged bankrupt, and, prior to an adjudication thereon, composition proceedings are instituted and a composition had with the creditors of such alleged bankrupt: *Held*, that such composition will not dissolve an attachment issued and levied within four months from the date of filing such petition, as against a creditor who took no part in such composition proceedings.

(*Before LOVE, J.*)

Attachment.—Composition Proceedings.

SEPTEMBER 14, 1875, Armill brought an action in the district court of Iowa, in Scott county, against Shields, by attach-

In re Shields.

ment, and upon the same day levied upon certain personal property of Shields. Immediately thereafter, certain creditors of Shields filed an involuntary petition in bankruptcy against him, and, upon the same day, Shields applied for a composition meeting, under the provisions of section 17 of the act of congress, entitled "An act to amend and supplement an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867, and for other purposes," approved June 22, 1874. A meeting was called, under the direction of the court, for that purpose. On the 20th day of October, and prior to the convening of said composition meeting, Armill obtained judgment in the state court against Shields, and a special execution was authorized to be issued against the property attached. After the rendition of the judgment aforesaid, said meeting of creditors was held, at which said Shields proposed a composition with his creditors, which was duly accepted and confirmed by the requisite number of creditors, and, upon hearing before the court, approved and ordered recorded as provided by law.

Shields was not adjudged a bankrupt, nor was any assignee appointed, nor any assignment made of his estate. Armill had notice of all proceedings in the court of bankruptcy, but took no part therein.

Armill refused to accept payment under the terms of the composition, but threatened to issue execution upon his judgment and sell the attached property; and thereupon Shields filed this bill in the court of bankruptcy, asking that Armill be enjoined from proceeding under his judgment.

Brown & Campbell, attorneys for Shields.

Stewart & White, attorneys for Armill.

LOVE, J.—The precise question in this case is, whether or not a composition under the bankrupt law, without an adjudication and assignment, operates to displace or dissolve an attachment in a state court, levied within four months of the proceedings in bankruptcy.

In re Shields.

There is nothing in the amendment of the bankrupt law providing for compositions, that in express terms affects attachments in the state courts. The original act, which is still in force, provides that the "assignment shall relate back to the proceedings in bankruptcy; and thereupon, by operation of law, the title to all the bankrupt's property and estate, both real and personal, shall vest in said assignee, although the same shall then be attached on *mesne* process as the property of the debtor, and shall dissolve any such attachment within four months next preceding the commencement of said proceedings."

There is no doubt that the attachment in this case would have been dissolved, if the composition had been consummated after an adjudication and assignment; not, however, by virtue of the composition, but in consequence of the adjudication and assignment. There was, in fact, no adjudication and assignment. It cannot be claimed, therefore, that the attachment was displaced by the very terms of the law; but the complainant insists that the composition operated to produce the same result. The argument of the complainant, and of the cases which he cites, is that the composition extinguishes the debt, and that no attachment lien can continue after the debt is discharged. This argument, manifestly, proves too much; for by the same reasoning all other liens, as well as attachment liens, would be destroyed by the composition. The composition, like a regular discharge, releases the debtor from the personal obligation to pay his debts; but neither the one nor the other affects the creditor's rights *in rem*, or his security by valid and subsisting liens. On the contrary, the bankrupt law in express terms preserves to the creditor all valid liens upon property, and to that extent undoubtedly keeps his debt alive. To this, the solitary exception is the case of attachments levied within four months of the commencement of the proceedings in bankruptcy, and this not by implication or inference, but by the express terms of the law.

Now, in my judgment, the composition clause of the law should receive a strict construction, because it is in plain derogation of common right. It compels the dissenting minority of

In re Shields.

creditors to accept just as much upon their claims as the debtor and the requisite majority see fit to resolve that all shall accept. It takes from the minority the common right of making their own terms with their debtor, and releases the obligation of the latter to them against their will, and upon terms imposed by the majority. Certainly, therefore, the provisions of this clause should not be extended by construction to embrace more than the words clearly and manifestly import.

Let us consider the matter from another point of view. The debtor and the required majority of creditors, without waiting for any adjudication, and before it is judicially determined that the debtor is insolvent, enter into an agreement of composition by which it is stipulated that the debtor shall pay a certain per cent upon his indebtedness to those who dissent as well as to the assenting creditors, and the bankrupt law annexes a certain legal consequence to this agreement. The law provides that, by virtue of this composition, the debtor shall be discharged from all personal obligation to pay his debts, beyond the stipulated sum. This clause of the law makes no provision whatever as to the displacement of liens, whether by attachment or otherwise. The basis of this adjustment is covenant. All the creditors are parties to it—the majority by their own voluntary assent, and the minority by operation of law.

But it is contended that it is to be treated as precisely equivalent to a proceeding in which the debtor is regularly adjudged to be insolvent and required to surrender all his property to his creditors, and in which the court further decides that the debtor is by misfortune and without fraud a bankrupt, and therefore entitled to a full discharge from personal liability to his creditors. As in the latter case certain attachments are by the express terms of law dissolved, so in the former, attachments in the same category are to be considered displaced without any express provision whatever to the same effect. This position does not seem to me to be logical. I should say, rather, that attachments within the four months are dissolved by the assignment, because the law provides that they shall be; and attachments in the same predic-

In re Shields.

ament are not displaced by a composition, because the law does not provide that they shall be so affected.

Again, have creditors with attachment liens within the four months a right to participate in the composition meeting? Judge TREAT, in *Re Scott, Collins, & Co.* 4 Cent. Law Jour. 29, held, upon what seems to me very solid grounds, that attaching creditors have no right to participate in and vote at the composition meeting. If so, it seems clear that such creditors should not be in any wise affected by the results arrived at by the parties to the composition. This question has been variously decided by the supreme courts of Iowa and Maryland on the one side, and Judges TREAT and LOWELL on the other.

It seems to me that the Iowa case is not at all conclusive upon this point, because the court expressed themselves as content to follow the decision of the supreme court of Maryland, "without entering upon examination and determination of the question." (See *Smith, Stebbens, & Co. v. Engle et al.* 9 Chicago Legal News, 47.)

Turning to the case of *Miller v. McKensie*, and others decided by the supreme court of Maryland, and reported in the National Bankruptcy Register for April 1, 1876, one cannot but be struck with the unsatisfactory character of reasoning of the court in support of its decision. The court takes no notice whatever of the manifest distinction between the attaching creditor's claim *in rem* and *in personam*, but insists upon the proposition that the composition extinguishes the debt, and therefore discharges the attachment. With equal justice might the court say that the final discharge, which releases the bankrupt debtor from personal liability, necessarily discharges all liens upon property by attachment or otherwise, because there can be no lien where the debt is extinguished—a proposition true enough as a general principle, but utterly fallacious when applied to the subject of liens, as recognized by the bankrupt law.

Perhaps the true answer to the argument of the Maryland court is, that the discharge or composition in bankruptcy affects rather the remedy than the debt itself. It is a defence that

Barney v. Keokuk.

must be set up specially in bar of the remedy, like the statute of limitations; and it is, perhaps, not accurate to say that the discharge or composition extinguishes the debt. It seems to me that the reasonings of Judges LOWELL and TREAT touching this question are solid and conclusive; and, without the least disparagement to the state supreme courts, I consider those learned judges the safer guides, because, while the attention of the state courts to the bankrupt law is casual and infrequent, that enactment has necessarily been to the judges referred to a subject of constant reflection and profound study.

Bill dismissed with costs.

• DECREE ACCORDINGLY.

HIRAM BARNEY v. CITY OF KEOKUK *et al.*

1. The owner of lots in the city of Keokuk, fronting on Water street, owns the fee in the street to the river, subject to the public easement.
2. The same rule applies to the original street and the newly made portions thereof reclaimed from the river.
3. Under the legislation of Iowa, as construed by the supreme court of the state (which construction was followed by this court), a railway company, with the assent of the municipal authorities, has the right to lay down its tracks over and upon Water street, in front of the plaintiff's lots, without the plaintiff's consent; but this right does not extend to the erection in the street of a permanent and substantial railway depot building in front of the plaintiff's lots, to the plaintiff's injury.
4. In view of the location and purpose of the dedication of Water street and the charter power of the city, it was held that the city might authorize a steamboat company to erect, for the shipment and receipt of merchandise, a building on or near the bank of the river in front of the plaintiff's lot, reserving municipal and police control over such structure.
5. Right to maintain ejectment subject to the public easement, *quære?*

(Before DILLON and LOVE, JJ.)

Barney v. Keokuk.

Dedication of Streets.—Municipal Control.—Railway Tracks and Depot Building in Street.—Steamboat Depot Building on Water Street.

ACTION in the nature of ejectment to establish plaintiff's right in Water street, Keokuk, subject to the, public easement therein. The plaintiff, in his petition, described the *locus in quo*, as follows: "All the land lying and being in front of lots five and six, in block three, in the city of Keokuk, and extending from the front line of said lots to the Mississippi river, the full width of said lots." The plaintiff is the owner of said lots five and six, block three, which front on Water street, and he claims to be the owner of the street in front thereof, subject to the rights of the public.

The defendants are the city of Keokuk and several railway companies and the steamboat packet company, that respectively occupy the street in front of the plaintiff's lots, under the authority of the city. All the railway companies occupy part of Water street by railway tracks, but only one of the defendants (the Keokuk and Des Moines Railway Company) has erected any building on the street.

The packet company use the street at the water line as a landing, and have erected on the street, as widened near the bank, in front of the plaintiff's lots, a building, in which to receive, shelter, and store merchandise received from or to be shipped on their boats. In the contract of the packet company with the city, dated March 28, 1870, it is provided that "the packet company shall not use and occupy said premises, otherwise than is customary for landing for steamers and storing merchandise, for *shipping purposes, without reward, for the convenience of shippers and commerce*, and said merchandise shall remain on said leased premises only for a reasonable time, to be governed by the police regulations for the government of the levee, according to the ordinances and resolutions now in force or that may hereafter be adopted and passed. Said building to be removed at the expiration of the ten years, at cost of packet company. In considera-

Barney v. Keokuk.

tion thereof, the packet company agreed to fill in with earth the space leased and macadamize the same, under the direction of the city engineer, and to receive at par the wharf bonds of Keokuk in payment therefor."

The city of Keokuk, by its charter, has the usual municipal power over streets and their uses; but there is no special provision in the charter as to railway companies occupying the streets. This subject is regulated by the general legislation of the state, known as the right of way act, which has been frequently construed by the supreme court of the state to authorize railway companies to lay their tracks longitudinally upon the public highway (although the fee thereof is in the adjoining proprietor), and upon the streets of cities, without compensation to the abutters or adjoining owners.

As to wharves, the amended charter of January 22, 1853, section 7, provides as follows: "The said city council of Keokuk shall have the power to establish and regulate a wharf or wharves in said city, and more particularly *to use the whole of Water street for said purpose*, and to fix rates of landing and wharfage of all boats, rafts, water crafts, goods, wares, merchandise, produce, and other articles that may be moored at, landed, or taken from any landing, wharf, or wharves that have been or may be hereafter established by said city."

The other facts were mainly agreed upon, and appear in the report of the case on error, in 94 U. S. (4 Otto) 324, and are here omitted to save space.

The case was submitted to the circuit judge, originally, upon written arguments; after considering which he made the following order:

"In view of the important and difficult questions in this cause, it is ordered that it be set down for oral argument at the next term, upon the following points:

"1. Is the fee of the *locus in quo* in the plaintiff? And herein, whether there was any valid dedication of Water street, as respects the plaintiff's lots, prior to the decree of partition, and particularly whether the Galland map operated as an effectual

Barney v. Keokuk.

dedication? And herein, as to the effect of the deeds of Marsh, Lee, Delevan, Galland, and others, of June 14, 1837, for lots on Water street, including a lot in block three, and elsewhere, in the town of Keokuk, 'as per plat thereof,' in connection with the fact that Marsh, Lee, and Delevan, trustees, afterwards drew the lots now owned by the plaintiff? Is the plaintiff estopped by these facts to deny a dedication of Water street prior to the decree of partition? Counsel will furnish an abstract of title of the plaintiff's lots from the beginning.

"2. If there was such prior dedication, what was the effect of it as respects the fee of the street, under the statutes then in force in that regard? And herein, see construction of statutes in *Schurmeier v. St. Paul, etc. Railroad Company*, 10 Minn. 103 *et seq.*; affirmed, 7 Wall. 272; and what has been the construction of the statutes, in this regard, in Michigan, Wisconsin, Illinois, and Iowa? And if the construction in Iowa is in conflict with the case in 7 Wall. 272, which construction should be applied in this case?

"3. If there was no effectual dedication prior to the partition decree, or none binding upon the plaintiff, and supposing that to leave the fee in Water street in the adjoining lot owners, subject to the public easement, can the city authorize the uses which has been made of Water street by the several railway companies and the packet company?

"4. If the right is with the plaintiff, is ejectment a proper remedy to enforce it?"

At the October term, 1876, the cause was accordingly argued at the bar before DILLON and LOVE, JJ.

George W. & A. J. McOrary, J. L. Rice, and W. B. Collins, for the plaintiff.

Craig & Collier, Gillmore & Anderson, Ingersoll & Puterbaugh, Seaton & Spaan, W. S. Bush, and John Gibbons, for the several defendants.

DILLON, Circuit Judge (LOVE, J., concurring), announced that the court had reached the following conclusions:

Barney v. Keokuk.

1. There was no completed statutory dedication of Water street under the town plat act of 1839, prior to the decree of partition, for the reason, among others, that *all* of the proprietors, *i. e.*, the half-breed owners and their grantees, did not join in making a plat or in selling lots according to the Galland or other plat. What was done prior to the decree, was at most a common law dedication by those who platted or recognized the plat, and it was, therefore, competent for the decree of partition to provide, as it did, that "lots on Water street should include *all the land in front of the lots to the Mississippi river.*" This seems to have been the accepted view of the question. (*Milburn v. Railroad Company*, 12 Iowa, 246; *Haight v. Keokuk*, 4 Iowa, 199.) This leaves the *fee* of the land in Water street in the adjoining lot owners, including the plaintiff, subject to the rights of the public.

2. The additional ground made by filling in Water street by the city, outside of the original water line, partakes of the same character as the original street. The *fee* of the newly made ground in front of the plaintiff's lots is, therefore, in the plaintiff, but it is subject to the same public uses as the original street. (*Haight v. Keokuk*, 4 Iowa, 199, 214; *Wood v. San Francisco*, 4 Cal. 190; *New Orleans v. United States*, 10 Pet. 662.)

3. Under the legislation of Iowa, as construed by the supreme court of the state, railroad companies, certainly with the assent of the municipal authorities, have the right to lay down their tracks in the streets of a city, whether they were dedicated under the statute or as at common law — that is, whether the *fee* be in the city or in the adjoining proprietor. The cases in relation to railway tracks in common highways, and those relating to railways in streets in Dubuque and Burlington, establish this. (*Milburn v. Cedar Rapids*, 12 Iowa, 249; *Clinton v. C. R. & M. R. R. Co.* 24 Iowa, 455; *Tomlin v. D. B. & M. R. R. Co.* 32 Iowa, 106; *C. N. & S. R. Co. v. Newton*, 36 Iowa, 399; *Cook v. Burlington*, 36 Iowa, 357; *Clinton v. C. & D. R. R. Co.* 37 Iowa, 61; *Ingraham, Runndig, & Day v. C. D. & M. R. R. Co.* 38 Iowa, 669.) The court should adopt as a rule of decision,

Barney v. Keokuk.

on such a question, the exposition of the state statutes by the supreme court of the state. (*Suydam v. Williamson*, 24 How. 427; *Leffingwell v. Warren*, 2 Black, 599, 603; *Christy v. Pridgeon*, 4 Wall. 196; *Nichol v. Levy*, 5 Wall. 433; *Shipp v. Miller's heirs*, 2 Wheat. 316; *Jackson v. Chew*, 12 Wheat. 162; *Swift v. Tyson*, 16 Pet. 17.)

4. This, however, does not give the railway company, even with the assent of the municipality, the right to erect a permanent and substantial *depot building* in the street. The right of way act of 1853 has never been thus extended by any judicial exposition of the state supreme court, nor, in our judgment, ought it to be, at least in cases where the fee is in the abutting lot owners.

5. In view of the location and situation of Water street, and the presumed intention of the dedication thereof to the public, and guided by the opinion of the supreme court of the state in this regard, in *Haight v. Keokuk*, *supra*, and the power of the city as to wharves, and the use of Water street for that purpose, given by the act of 1853, Water street may be used for levee and wharf purposes under municipal management and control. The building erected by the packet company, under the contract with the city of March 28, 1870, for the purposes therein mentioned, for the receipt and temporary shelter and storage of goods, etc., subject to municipal control, is a reasonable use of Water street as a wharf or levee as incidental to the requirements of navigation and shipping, and does not infringe the plaintiff's rights. (*Illinois and St. Louis Railroad and Canal Company v. St. Louis*, 2 Dillon, 70.)

6. We have some doubt as to the right to maintain *ejectment* in such a case as this, but, under the practice in this state, we can adjudge the right even though we could not issue a writ of possession. The plaintiff may take a judgment as respects the railway depot building in such form as he prefers.

JUDGMENT ACCORDINGLY.

Barney v. Keokuk.

NOTE.—The judgment in this case was affirmed, on all points, at the October term, 1876. (4 Otto, 324.)

Mr. Justice BRADLEY, delivering the opinion of the supreme court, makes this important statement concerning a distinction which has often been made the basis of measuring the extent of the rights of the abutting proprietors: "On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights, whether the fee is in the public, or in the adjacent land owner, or in some third person."

In view of the facts of the case, this observation cannot fairly be considered as *obiter*, for the plaintiff's case essentially rested upon the proposition that he was the owner of the fee of the street in front of his lots, and that this gave him the right to recover—a right which it was clear, under the laws of Iowa, he did not otherwise possess. But whether the principle stated in the above extract was actually in judgment or not, it is the sound doctrine as applied to streets in cities and incorporated places, and will, eventually, be acknowledged as such, wherever the legislative will is silent and the courts are not tied down by previous decisions.

In the *Railroad Company v. Schurmeier*, 7 Wall. 272 (which, for a better understanding of it, should be read in connection with the same case below, 10 Minn. 82), which was similar to the principal case in all essential respects, a different result was reached. The supreme court of Minnesota held that the use of the "landing" and streets by the railway company was an additional servitude, of which the adjoining lot owner could not be deprived without compensation to him; and Mr. Justice CLIFFORD, in the concluding part of his opinion (7 Wall. p. 289), seems to assent to the correctness of this view. In *Schurmeier's* case the result was that the railroad company was enjoined, at his instance, from constructing its road on the landing and streets in front of his lots. But in *Barney's* case the railroad company was held to have the right thus to use the street. These opposite results, under statutes substantially the same, are in consequence of the supreme court of the United States adopting in each case, as a rule of decision, the conflicting construction of the state legislation by the supreme courts of Minnesota and Iowa.

—REP.

APPENDIX.

THE UNITED STATES *v.* THE LOUISVILLE AND PORTLAND CANAL COMPANY.

1. Where the judge of the district court for the district in which a bill in equity is brought, and the circuit judge for the circuit, and the justice of the supreme court allotted to that circuit, are all absent from the district and circuit, another justice of the supreme court has jurisdiction, at any place in the United States, to hear an application for an injunction, notwithstanding the act of congress of June 1, 1872. [See Rev. Stats. sec. 719.]
2. The legislative history of the Louisville and Portland Canal Company from its first incorporation by Kentucky, in 1825, down to the present, and its relation to the government of the United States, given by Mr. Justice MILLER, who holds that the corporation is still in existence, and has the right to use and control the canal and its revenues so far as may be necessary for the purposes contemplated by the act of the legislature of Kentucky and the joint resolution of the two houses of congress of May 24, 1860.
3. The United States is the only stockholder in the company, and its directors are naked trustees without an interest; and, under the state and federal legislation concerning the canal and the bonds issued to raise money to enlarge and improve it, secured by a mortgage of the revenues and tolls of the canal company, there are three parties interested in the trust and the manner in which its duties shall be discharged by the company: 1st, the bondholders of the company; 2d, the government of the United States, sole stockholder, and which has expended \$1,000,000 upon the canal; and, 3d, the general public.
4. The appropriation act of congress of June 10, 1872, in relation to the canal, construed so as not to impair the rights of the bondholders, and the opinion expressed that congress could not abolish or so limit the tolls as injuriously to affect them, "for the plain reason that it would be a legislative attempt to destroy vested rights, and a taking of private property for public use without due compensation."
5. Under the circumstances of the case, the president and directors of the canal company were enjoined, at the suit of the United States, from interfering with its engineer officers and contractors in the prosecution of the work of repairing and improving the canal.

United States v. Louisville, etc., Canal Company.

(Before MILLER, Circuit Justice, at Chambers.)

Federal Court Practice.—*Power of a Justice of the Supreme Court to act out of the Circuit to which he is Assigned.*—*The Louisville and Portland Canal Company.*—*The Rights therein of the Bondholders, the Government, and the General Public Declared.*

BILL IN EQUITY to enjoin the defendant company from interfering with the engineer officers of the United States and the contractors in making certain repairs and improvements in the Louisville and Portland Canal. The facts appear, and the case is stated, in the opinion.

MILLER, *Circuit Justice.*—Upon a bill in chancery directed to the judges of the circuit court of the United States for the district of Kentucky, an application is made to me at Long Branch, in the state of New Jersey, to enjoin the Louisville and Portland Canal Company from interfering with the engineer officers of the United States, and the person with whom they have contracted for the work of making certain repairs and improvements in said canal, under authority of an act of congress appropriating money for that purpose, approved June 10, 1872. An affidavit of the attorneys of the United States accompanies the application, which shows that the judge of the district court for that district, the judge of the circuit court of that circuit, and the justice of the supreme court allotted to that circuit, are all absent from and without the district and circuit. I am of the opinion, therefore, that, notwithstanding the provisions of the seventh section of the act to further the administration of justice, approved June 1, 1872 [see Rev. Stats. sec. 719], I have jurisdiction to hear the motion, and that it is my duty to do so.

The language of the act under which the agents of the government are proceeding is important. It is found in the act "making appropriations for the repair, preservation, and completion of certain public works on rivers and harbors, and for other purposes," and is, *verbatim*, as follows: "For the continuing the work on the canal at the falls of the Ohio river, three

United States v. Louisville, etc., Canal Company.

hundred thousand dollars. And the secretary of war is hereby directed to report to congress, at its next session, or sooner, if practicable, the condition of said canal, and the provisions necessary to relieve the same from encumbrance, with a view to such legislation as will render the same free to commerce at the earliest practicable period, subject only to such tolls as may be necessary for the superintendence and repair thereof, which shall not, after the passage of this act, exceed five cents per ton."

A brief reference to the history of this canal, and its relations to the government of the United States, is essential to an understanding of the matter now presented for consideration.

By an act of the Kentucky legislature of January 12, 1825, a corporation was chartered, by the name of the Louisville and Portland Canal Company, to construct a canal around the falls of the Ohio river, with a capital stock of six hundred thousand dollars, divided into shares of one hundred dollars each, with the right to levy tolls on vessels passing through the canal. By subsequent statutes the capital was increased to ten thousand shares, and the United States, under acts of congress, became the owner of twenty-nine hundred and ten of said shares. The canal was constructed, and has ever since been in successful and profitable operation; and the tolls collected under the limit of the charter granted by the state yielded such a revenue, beyond what was necessary to keep the canal in repair, that, by the joint legislation of the state and the United States, and by the consent of the individual corporators, a plan was adopted and entered upon to make the canal free to the uses of commerce, except so far as might be necessary to keep it in repair. This plan was inaugurated by an act of the Kentucky legislature, passed in 1842, the provisions of which were accepted by the stockholders, including the United States. Its essential features were that the surplus revenues of the corporation should be used to buy up all the stock held by others than the United States, and that when this should be accomplished the canal should be transferred to the control of the government for the use of the public, subject only to such tolls as might be necessary for its super-

United States v. Louisville, etc., Canal Company.

intendence and repair. This plan was so far carried out that in the year 1855 all the shares other than those held by the United States had been purchased in, except five shares left purposely in the hands of as many individuals, to qualify them to hold office as directors of the corporation.

But while this process of extinguishing the individual shares had been going on, it became clear that the demands of commerce required an enlargement of the canal and a change in its place of lower outlet, which could only be made by an additional or branch canal. The successful use of the tolls in buying in the shares of private stockholders, pointed at once to the means of making this increase in the capacity of the canal without burdening either the state or federal government; and, by statute of the Kentucky legislature of 1857, and joint resolution of the two houses of congress of 1860, the canal company was authorized to do this work, and to borrow money for that purpose, and pledge the faith of the company and its tolls or revenues for the money so borrowed. The corporation accordingly issued its bonds for \$1,600,000, secured by a mortgage on the canal, its franchises, and its tolls and revenues; and proceeded to expend the sum realized on these bonds in the enlargement and improvement of the canal. It proved, however, that when this money was all expended the canal was still unfinished; and the congress of the United States, in the year 1868, commenced a series of appropriations for the purpose of completing the work, which has been continued to the present time. Over \$900,000 have thus been appropriated and expended under the control and direction of the officers of the government, and the appropriation of 1872, already referred to, was in continuation of this work.

During this time the president and directors of the Portland Canal Company and the officers of the United States seem to have acted in harmony, the corporation collecting the tolls and paying for and superintending the temporary repairs. They have also paid the interest on the debt, and redeemed or bought in about half a million in amount of the bonds. This harmony

United States v. Louisville, etc., Canal Company.

would probably have continued but for the clause in the present act of appropriation, that, "after the passage of this act, the tolls should not exceed five cents per ton." It is the first time that congress has attempted to regulate or limit the tolls to be collected on vessels using the canal. The rate thus limited would not produce enough to make the ordinary and necessary repairs, and pay for the superintendence of the canal. It would leave the interest on the bonds unpaid, and largely impair, if not destroy, the security of the bondholders for the payment of the principal.

The president and directors of the company construe the act as appropriating the money on the *condition* that the tolls shall be limited to five cents per ton, and they say that an acceptance of the appropriation would be an implied consent to this limitation. They, therefore, notified the officer in charge that they refused to accept the appropriation. That officer, however, proceeded to let the work and commence operations, and the corporation interfered by physical force to prevent it, and I am now asked by the bill before me, filed in behalf of the United States, to enjoin the corporation from this interference.

The officers of the canal company maintain: 1st, that the corporation is the legal owner of the canal, and that neither the government of the United States nor any one else has the right to assume such control of its property, as the action of the engineer officers seek to do, without the consent of the directors of the company; and, 2d, that a due regard to their duty to the bondholders and other creditors of the corporation forbids them from giving either express consent, or such consent as inaction would imply, to the assumption of the United States to reduce the tolls found in the appropriation act.

The United States, by its counsel, on the other hand, maintain that since the year 1855 the corporation has had no existence as such, or, if it has any existence, it is merely a nominal one, as the agent of the government, for whose sole use it is kept alive; and that as the government owns practically all the stock, it has, and should have, the right to control the use, and direct the

United States v. Louisville, etc., Canal Company.

changes and improvements in the canal. This view is supposed to receive additional force from the powers and duties of the national government in regard to the navigable waters of the United States.

The first, and perhaps the most important, question to be determined, is the relation of the corporation and its officers to the possession and control of the canal. The proposition of the government counsel is based upon the idea that when, under the act of 1842, all the private stock had been bought, the government became, without other action, the owner, and entitled to the possession and control of the canal; and that, both by operation of that statute and the necessity of the case, the corporation ceased to have an existence, or at least to have any right or title to the canal; and this argument is made stronger, in the opinion of counsel, by the circumstance that at that time, to-wit, on the 31st day of January, 1855, by a report to the secretary of the treasury, the directors advised him of the purchase of private stock, and the readiness of the corporation to transfer the custody of the canal to the United States so soon as the department was prepared to receive it. But it does not appear that the department was ready to receive the transfer. Certainly no formal act, either of congress or of the department, accepting this transfer or acknowledging the obligation on which alone it was to be so transferred, namely, to hold it for the use of the public free of tolls except so much as might be necessary for its superintendence and repair, is shown or claimed. On the contrary, in reply to the notification of the company, the secretary requested them to continue their organization by retaining a share of stock for each director to maintain his eligibility as such, and to manage the affairs of the canal as heretofore.

But whatever doubt may exist as to the precise relations of these officers to the work at that time, is removed by the subsequent act of 1857 of the state legislature, and the joint resolution of congress of 1860. These have already been referred to, as authorizing the company to extend and enlarge the canal, and to contract a debt for that purpose; but as the language of the

United States v. Louisville, etc., Canal Company.

joint resolution of congress, approved May 24, 1860, seems to me to be conclusive of the continued existence of the corporation, I will give its precise terms. It was resolved: "That the president and directors of the Louisville and Portland Canal Company be, and they are hereby, authorized, with the revenues and credits of the company, to enlarge the said canal, and to construct a branch canal from a suitable point on the south side of the present canal to a point in the Ohio river opposite Sand Island, sufficient to pass the largest class of vessels navigating the Ohio river." The resolution had two provisos—one protecting the United States from liability for the debt so incurred, and the other declaring that when the work was completed, *and paid for*, no more tolls should afterwards be collected than were necessary to keep it in repair, and pay for its superintendence and management.

This resolution, beyond all controversy, clearly recognizes three facts of important bearing on the matter in hand: 1st, the existence of the corporation called the Louisville and Portland Canal Company; 2d, that it had revenues and credits which might be sufficient to enable it to raise means for this large and expensive work; 3d, that it had the right, or it was then given, so far as the United States could give it, to use these credits and revenues for that purpose. It is inconceivable that this company had any other revenue than the tolls from the canal, or any other credit than that which arose from the right to these tolls, and the ownership or control of the canal. To me it seems that this is conclusive of the existence of the corporation, and of its right to use and control the canal and its revenues, *so far as was necessary for the purpose contemplated by the act of the Kentucky legislature and the joint resolution of the two houses of congress.*

But, while these considerations prove the continued existence of the corporation, the validity of the contract by which they pledged the canal and its revenues for the money borrowed for its extension, and its duty to secure and protect this revenue, and to do all that lawfully may be done to prevent its destruction or

United States v. Louisville, etc., Canal Company.

diversion from that purpose, it is still true that the directors of this corporation occupy a very peculiar position, and one widely different from the directors of railroads, insurance companies, and other corporations for private gain. The United States is the only stockholder of this corporation. The directors have really no personal interest in the corporation or its property. They are to all purposes what equity calls trustees without an interest—the depositaries of a naked trust. For whom do they hold this trust, and for whose benefit must they exercise it? This inquiry, though lying at the foundation of the question to be solved here, is, fortunately, not a difficult one. There are three parties interested deeply in this trust, and in the manner in which its duties shall be discharged, which I review in the order of the superiority of their claims, rather than their importance: 1st, the holders of the bonds, secured by the mortgage, authorized and placed under a two-fold legislative sanction by the legislature of Kentucky and the congress of the United States; 2d, the United States, the holder of all the stock in the corporation, expending a million of dollars beside, for the benefit of the canal; and, 3d, the public—the community—to whose use, free of all charges but those necessary to keep it in operation, it has been solemnly dedicated by the legislature of Kentucky, by the congress of the United States, and by the action of the corporation itself, as well as by all the acts of all these parties from 1842 to the present time, so soon as the enlargement is completed, and the debt thereby created discharged.

As regards the first of these, I have no hesitation in expressing my entire conviction that the bondholders have a lien upon the revenues of the canal, and a right to insist that the corporation shall protect these revenues to the extent necessary to make entirely safe the payment of their debt and its accruing interest; and that, until that debt is paid, or the mortgage satisfied, or otherwise discharged, with the consent of these bondholders, this right of theirs remains, with the corresponding duty of the directors of the corporation. But the right of these creditors is limited to this; and so long as their security is unimpaired, it is

United States v. Louisville, etc., Canal Company.

the duty of directors to advance the other interests I have mentioned, for which they are trustees. The interests of the United States and of the public are, for present purposes, identical. The government has, in all its actions, shown its desire and its intent that, at the earliest moment, the public use of the canal should be freed from all burdens save those necessary for its repair and management; and her very act which has given rise to the present opposition of the president and directors, is wholly in the interest of the public, and designed to hasten the end long contemplated by all parties.

Now, if the act of the United States in completing the enlargement of the canal is an act for the benefit of all these parties, the bondholders inclusive, the resistance of the president and directors is an act in detriment of their trust, injurious to all the interests confided to them, and a mere arbitrary exercise of power which should be restrained. If, on the other hand, any one of those interests would be seriously prejudiced, they should not be disturbed in the exercise of a reasonable discretion in the protection of that interest.

That the work itself which is being done by the government is a useful and a necessary work for the public good, and for that of the United States, as a stockholder, and as the representative of the public, is undeniable. That it also adds to the value of the security of the bondholder, and is to that extent in his interest, is equally clear. But, in regard to the latter, if, as alleged by defendant, the work is being constructed in a manner which so far obstructs the use of the canal as to endanger the revenue from which this interest is to be paid; or if, as the trustees seem to believe, the work, when completed under the present act of congress, will extinguish the right of the corporation to collect sufficient tolls to pay both principal and interest of their debt—then the work should not be done, for these rights are paramount.

In regard to the manner of doing the work, the affidavits submitted satisfy me that no such serious obstruction to the use of the canal, or to the repairs which the directors wish to make, will result from the work as that claimed by the defendant—none

United States v. Louisville, etc., Canal Company.

which should be set up for a moment in comparison with the great value to all parties of the vigorous prosecution and early completion of the work of extension and enlargement. But I am satisfied that the president and directors are honest in their belief that an acquiescence on their part in the expenditure of this appropriation on the canal would bind them legally, as an acknowledgment of the government limitation of the tolls—an acknowledgment which would be a violation of their official duty. Of this result they will be rid, if their action is controlled by a competent court against their protest. To refrain from disturbing the contractors and engineers in expending this money, when their hands are tied by an injunction, raises no presumption of acquiescence in the claim of the government to reduce the tolls to a minimum.

Should the court so restrain? or, if they are right in their construction of the statute, should they be permitted to resist congressional interference in this matter? This leads me to a remark or two on the construction of the appropriation act. The first sentence is a distinct and clear appropriation of \$300,000 for the continuation of the work in which the government had for several years been engaged, and in which it had spent, aside from its stock, near a million of dollars. The subsequent sentence directs the secretary of war to report to congress what legislation is necessary to relieve the canal of encumbrance, so that it may be free from all other tolls than what is required for its management and repair; and this sentence declares that such tolls, after the passage of this act, shall not exceed five cents per ton. That the appropriation is absolute, and independent of the clause concerning tolls, I have no doubt. It might as well be argued that it was dependent on the report of the secretary of war. Whether, therefore, the tolls be reduced or not, the appropriation remains, and should be carried into effect. When we consider that the next sentence recognizes the encumbrance on the canal—no doubt meaning the one in favor of the bondholders, so often mentioned in this opinion—and directs an inquiry as to what action by congress is necessary to remove it, I can hardly believe

United States v. Louisville, etc., Canal Company.

that, in the same sentence, it was intended to destroy the essential thing on which that encumbrance rested—namely, the tolls. The argument is, therefore, not without force, that congress meant, when they said such tolls should not exceed five cents per ton after the *passage of this act*—such act as they contemplated in future to pass—to satisfy or remove that encumbrance. It must be confessed that the language is not apt for this construction; that, in their caution, the directors might well have supposed, that congress intended to limit the tolls at once to five cents per ton. If this construction of the statute be correct, then I have no hesitation in saying that that part of it which so limits the tolls is void, for the plain reason that it is a legislative attempt to destroy vested rights, and a taking of private property for public use without due compensation. I think I have shown that the prosecution of this work is for the benefit and advantage of all concerned; that it does not seriously interfere with the ordinary use of the canal; and that the accomplishment of the work will neither confer on congress the right to regulate the tolls, nor validate the attempt already made to do so, if congress really intended to make such an attempt.

Under these circumstances, I have no hesitation in controlling the president and directors of the canal company in the exercise of the great trust committed to them, so far as may be necessary to permit this work to go on; and, in exercising this control, I feel satisfied that I am relieving them from an embarrassment and responsibility which they will gladly rest on the shoulders of the court. The injunction will be granted.

ORDERED ACCORDINGLY.

NOTE.—A marked feature in the foregoing opinion is the favorable light in which it regards the rights of the bondholders of the corporation, the learned justice declaring with emphasis that even *congress* could not limit the tolls of the canal, pledged for their benefit, so as to impair their rights. In England, parliament would possess this power, as shown by the case of *Brown v. Mayor, etc. of London*, 9 Com. B. (N. S.) 726, 1861. There a statute discharged the liability of the city of London on bonds payable out of tolls and duties levied on vessels navigating

United States v. Louisville, etc., Canal Company.

the Thames; and it was held that no action would thereafter lie against the corporation thereon, on the principle that where the performance of an obligation has been rendered impossible by act of the law, the obligation is discharged. (See, also, *St. Louis v. Shields*, 52 Mo. 351; Dillon on Munic. Corp. sec. 41 *et seq.* [2d ed.] note.)

As to the right of the United States to bring an injunction bill in the proper circuit court, to protect improvements which she is making under the authority of congress, in navigable waters, from injury which will be caused by acts done by state authority: see *United States v. Duluth* (city of), 1 Dillon, 469; sequel to same case, 2 *ib.* 496.

INDEX.

ABATEMENT.

1. **PENDENCY OF SUIT IN STATE COURT.**—A plea in abatement of a cause in the *federal court* that another suit is pending in a state court, is not good where the parties to the two suits are not the same. *Brooks v. Mills County*, 524.
2. *Same.*—Whether a party, in the United States circuit court for any district, may plead in abatement of a suit therein the pendency of a prior suit *within the same district*, between the same parties, and upon the same subject matter, discussed by Love, J., *Ib.*
3. *Same.*—Cases on the subject collected and commented on, *Ib.* note, 529.

ABETTING AND AIDING. See *Bankrupt Law*.

ACTIONS. See various heads.

1. The United States may enforce by suit the payment of taxes assessed by it, 66.
2. Against administrator, where the supposed intestate was alive. *United States v. Payne*, 387.
3. Recovery, by assignee in bankruptcy, of *illegal interest* paid by bankrupt to national bank, 386.
4. Action against *county* on warrants and levee bonds, 209, 215, 216, 224, 233.
5. Against municipalities. See *Municipal Corporations*; *Municipal Bonds*.
6. Actions against *receivers*, 506.

ADMINISTRATOR. See *Indians*.

1. Liability where the supposed intestate is alive. *United States v. Payne*, 387.
2. Administrator's sale of land in Nebraska. See *Guardian's Sale*.

ADMIRALTY.

1. **LIE OF MATERIAL-MAN.—DOMESTIC VESSEL.**—A material-man has no lien for repairs or supplies to a domestic vessel. *The Albany*, 439.
2. **WHAT IS A DOMESTIC VESSEL.—HOME PORT.—ENROLLMENT.**—Whether a vessel is foreign or domestic, depends upon the residence of her owners, and not upon her enrollment, where the two are different. *Ib.*

ADMIRALTY.—Continued.

3. *Same*.—The "Albany" was owned at the town of Boscobel, in Wisconsin, and was enrolled at Galena, in Illinois, the nearest collector's office to the residence of the owner; necessary supplies were furnished by the libellant to the vessel at LaCrosse, in Wisconsin: *Held*, that the libellant was not entitled to a maritime lien on the vessel, *Ib.*

ADULTERY.

- Of wife does not bar dower in Iowa. *Smith v. Woodworth*, 584.

AFFIDAVIT. See *Removal of Causes*.AGENT. See *Bankrupt Law; Banks; Insurance*.AIDING AND ABETTING. See *Bankrupt Law*.ALIEN. See *Constitutional Law; Naturalization*.

Removal of causes by. See *Removal of Causes*.

APPEAL.

1. EXECUTION of final decree in equity pending an appeal where there is no supersedeas. *Farmers' Loan and Trust Company v. Central Railroad*, 531, 546.
2. ORDER confirming sale appealable, and the appellants may supersede it, although they failed to supersede the main decree. *Farmers' Loan and Trust Company, v. Central Railroad*, 546, 548, *note*.
3. EFFECT OF APPEAL.—EXECUTION OF DECREE.—The pendency of an appeal from a final decree in equity, in which no supersedeas exists, does not deprive the court which rendered the decree from making proper orders to enable the party in whose favor the decree was rendered to have the same executed. *Ib.*

ARKANSAS.

1. CASES REPORTED—From eastern district of Arkansas, 209—238.
2. From the western district, 239—250.
3. COUNTY WARRANTS.—Defences, rights of holder, 209, 215, 216, 233.
4. LEVEE BONDS.—Mode of payment, 216.
5. MANDAMUS.—To levy taxes to pay judgment on railroad aid bonds, 224.
6. CONSTITUTION OF ARKANSAS, of 1874, in respect to municipal and county indebtedness, construed, 215, 224, 233.

ARREST OF JUDGMENT. See *Criminal Law*.

ATTACHMENT.

- Effect of bankruptcy on attachment of property on *mesne* process (see *Bankrupt Law*), 173, 519, 549, 588.

BANKRUPT LAW.

1. JURISDICTION OF CIRCUIT COURT.—AMOUNT.—Suits may be brought in the circuit courts of the United States by assignees in bankruptcy, without reference to the amount or value in controversy. *Payson v. Coffin*, 386.
2. RIGHT OF ACTION.—ILLEGAL INTEREST.—Right of action to recover back illegal interest paid by the bankrupt to a national bank passes to assignee in bankruptcy. Extent of recovery. *Crocker v. National Bank of Chetopa*, 358.
3. LIMITATION OF ACTIONS.—A suit by an assignee in bankruptcy to collect debts or claims due to the estate, must be brought within *two years* from the time when the cause of action accrued to the assignee. *Walker v. Towner*, 165; *Payson v. Coffin*, 386.
4. *Same*.—WHAT IS A COMMENCEMENT OF SUIT.—Where an assignee filed his petition or declaration in a suit to recover such a debt within two years from the time when his right of action accrued, but gave directions to the clerk *not to issue the summons*, and such summons was accordingly not issued or served until more than two years from the time the cause of action accrued: *Held*, that the action was barred. *Walker v. Towner*, 165.
5. STATE AS PREFERRED CREDITOR.—Under the bankrupt act (Rev. Stats. sec. 5101), the *state* is entitled to be preferred to private creditors of the bankrupt. *Re Dodge*, 532.
6. ACT OF BANKRUPTCY.—COMMERCIAL PAPER.—CONTINUING DEFAULT.—LIMITATION.—A petition for adjudication in bankruptcy cannot be sustained, in which the only act of bankruptcy alleged is the failure to pay a specified piece of commercial paper, where the *original default* in payment occurred and had continued *more than six months and forty days* before the proceedings in bankruptcy were commenced. *Re Brewer & Bemis Brewing Company*, 345.
7. CORPORATIONS.—NUMBER AND VALUE OF CREDITORS.—Since the amendatory bankrupt act of June 22d, 1874 (18 Stats. at Large, 18), the same proportion of creditors must join in the proceeding to force a corporation into bankruptcy that is required in the case of natural persons. *Re Leavenworth Savings Bank*, 363.
8. DEPOSIT FOR CLEARING-HOUSE PURPOSES.—TRUST FUND.—Where a bank agreed to act as the agent of another bank for clearing-house purposes, and, as such agent, agreed to pay all the checks of the latter which came through the clearing-house, and received for that purpose, from time to time, the funds of the latter bank, which it passed to the credit of the latter bank, without keeping such funds separate from its own: *Held*, that the relation of debtor and creditor—the ordinary one of the bank to its depositors—was created, and that the deposits could not be considered as trust funds, which, on failure of the former bank, would not pass to its assignee. *Phelan v. Iron Mountain Bank*, 88.

BANKRUPT LAW—Continued.

9. *Same*.—PREFERENCE.—Under such circumstances, the funds, when deposited, became the property of the bank receiving the same, freed of any trust character; and where the bank that received and credited such deposits paid, on the day of its failure, the amount thereof to the bank which made the deposit, the latter bank having knowledge of the insolvent condition of the former bank, such payment is an illegal preference, which may be recovered by the assignee in bankruptcy. *Ib.*
10. PREFERENCE.—EXCHANGE OF SECURITIES.—The substitution and registry of a chattel mortgage, correcting a mistake in a prior unrecorded mortgage, is not an illegal preference, but simply an exchange of securities, and falls within *Sawyer v. Turpin*, 9 U. S. (1 Otto), 114. *Player v. Lippincott & Co.*, 124.
11. PREFERENCE.—FRAUDULENT AGREEMENT NOT TO RECORD SECURITY.—LIMITATION.—A deed of trust intended to give a creditor a preference, fraudulent under the bankrupt act, was executed more than four months before the commencement of proceedings in bankruptcy against the grantor therein; *in order to prevent the knowledge* thereof from coming to other creditors, and to have it validated by lapse of time, the grantor and beneficiary agreed that it should be kept off the record; after the lapse of four months from the date of the deed of trust, but within four months of the filing of the petition in bankruptcy, the instrument was deposited for record: *Held*, on a bill in equity, filed by the assignee in bankruptcy against the beneficiary, to set aside the deed of trust, that the suit was not barred because the proceedings in bankruptcy were commenced more than four months after the execution of the deed of trust. *Harris v. Exchange National Bank*, 133.
12. SURRENDER OF PREFERENCE.—Section 23 of the original bankrupt act (sec. 5088 of the Revised Statutes), in relation to the surrender of fraudulent preferences, is not repealed by the 12th section of the amended bankrupt act of June 22, 1874, amending section 39 of the original bankrupt act, nor section 5021 of the Revised Statutes. *Re Israel*, 501.
13. EFFECT OF SUCH SURRENDER.—PROOF OF DEBT.—A creditor who, before presenting his claim for allowance in bankruptcy, and against whom no action has been brought by the assignee to defeat the preference, surrenders his preference under section 23, may prove his *whole debt*, and not simply a moiety of it. *Ib.*
14. ATTACHING CREDITOR.—RIGHT TO FILE CREDITOR'S PETITION.—A creditor fully secured by attachment cannot, while holding on to his attachment, sustain, on the same debt, a petition to force his debtor into bankruptcy. *Re Hazens*, 549.
15. NUMBER AND VALUE OF CREDITORS.—ATTACHING CREDITORS.—Creditors who have obtained liens by attachment within four months

BANKRUPT LAW—Continued.

- before the commencement of proceedings in bankruptcy, are not to be reckoned in computing the proportion of creditors who must unite in an involuntary petition. *Re Scrafford*, 378.
16. ATTACHMENT DISSOLVED BY ASSIGNMENT.—An attachment of the property of a debtor is *ipso facto* dissolved if proceedings in bankruptcy are commenced within four months thereafter, upon which the debtor is adjudicated a bankrupt, and a deed of assignment be made. (Rev. Stats. sec. 5044; sec. 14 of original bankrupt act.) *Bracken v. Johnston*, 519; *McCord v. McNeil*, 173.
17. LIABILITY OF ATTACHING CREDITOR TO ASSIGNEE.—A creditor who proceeds in a state court by a writ of attachment on which he seizes the property of his debtor, and realizes his judgment obtained in such a suit by a sale of the property attached, is liable to the assignee in bankruptcy of the debtor, appointed under proceedings commenced in the bankruptcy court within four months of the levy of the attachment, although the assignee did not appear or defend the attachment suit, or make any attempt to arrest the attachment proceedings. *Wilson v. City Bank*, 17 Wall. 473; and *Eyster v. Gaff*, 91 U. S. R. 521, distinguished; *Bracken v. Johnston*, 519.
18. *Same.*—In such a case the assignee's right is superior to the right of the attaching creditor, although the attached property had been sold before the commencement of the bankruptcy proceedings, and the proceeds paid over to the creditor after the adjudication, but prior to the date of the deed of assignment. *McCord v. McNeil*, 173.
19. *Same.*—Such a sale of the attached property and payment of the proceeds to the creditor, do not distinguish the case in principle from *Bracken v. Johnston*. *McCord v. McNeil*, 173.
20. COMPOSITION.—EFFECT ON SECURED CLAIMS.—ACTION FOR DEFICIT.—A composition at twenty-five cents on the dollar was effected under section 17 of the act of June 22, 1874 (Stats. at Large, vol. 18, part 3, p. 178). In the statement of liabilities presented to creditors' meeting, plaintiff's claim was represented as fully secured by deed of trust on real estate worth more than the amount of the debt. Plaintiff, being also an unsecured creditor, attended the composition meeting, but did not in any way participate in it, nor dissent from the representation there made as to the value of his security. Long after the composition had been recorded and carried out by the debtors, plaintiff sold the real estate under the deed of trust, and a large deficit was left unpaid. In an action to recover such deficit: *Held*—1. The composition did not, *per se*, extinguish plaintiff's claim, and that he was entitled to twenty-five per cent of final deficit, no matter when ascertained. 2. *Quære*, whether this result would have been changed, even if, in the course of the composition proceedings, the bankruptcy court, at the instance of all the parties,

BANKRUPT LAW—Continued.

- had caused the security to be appraised, and had decided it to be ample to cover the debt? *Paret v. Ticknor*, 111.
21. *Same*.—Form of judgment. *Ib.* p. 114.
22. ATTACHMENT.—COMPOSITION PROCEEDINGS.—Where an involuntary petition in bankruptcy is filed against an alleged bankrupt, and, prior to an adjudication thereon, composition proceedings are instituted, and a composition had with the creditors of such alleged bankrupt: *Held*, that such composition will not dissolve an attachment issued and levied within four months from the date of filing such petition, as against a creditor who took no part in such composition proceedings. *Re Shields*, 588.
23. COMMISSIONS TO ASSIGNEE ON SALES OF PROPERTY.—Certain real estate of the bankrupt had been mortgaged by him prior to the bankruptcy, with a power of sale in the trustee; the district court ordered that the trustee sell the property, and that the assignee join in the sale; the property was sold to the mortgagee, and the amount of the bid was credited on his debt; no money was received or paid out by the assignee: *Held*, under the Revised Statutes, section 5100, that the assignee was not entitled to commissions on the amount for which the property was sold. *Re Slevin*, 131.
24. JURY TRIAL ON APPEAL.—A creditor, whose claim is rejected by the bankruptcy court, and who duly takes an appeal to the circuit court, and there files a declaration to which the assignee has pleaded, has the right to have the issues of fact thus presented tried by a jury. (Rev. Stats. secs. 4980, 4984.) *Thistle v. Hamilton*, 162.
25. WAIVER OF JURY TRIAL.—MODE OF WAIVER.—The right to a jury trial may be waived in such a case, and such waiver need not necessarily be by written stipulation, *Ib.*
26. *Same*.—Under the circumstances, the right to a jury trial was held not to have been waived by the creditor, where the appeal was inadvertently submitted and decided as if the cause had been brought to the circuit court by a writ of error, *Ib.*
27. CONSPIRACY TO COMMIT CRIMINAL ACTS.—Under the statute (Rev. Stats. secs. 5440, 5132), *other persons than the bankrupt* can conspire with the latter to commit the acts made criminal by the 7th and 10th sub-divisions of sections 5132 of the Revised Statutes. *United States v. Bayer*, 406.
28. *Same*.—AIDING AND ABETTING.—It seems that under the criminal section of the bankrupt act (Rev. Stats. sec. 5132), one who procures and abets the person against whom the proceedings in bankruptcy are pending, to commit the acts therein made criminal, may be indicted, though not expressly referred to in the statute, *Ib.*

BANKRUPT LAW—Continued.

29. **HOMESTEAD.—BANKRUPTCY COURT'S POWER TO ORDER DELIVERY OF POSSESSION BY THE BANKRUPT.**—Where a sale is made, under deed of trust, of a bankrupt's property on which he resides, and the proceeds are insufficient to satisfy the debt thereby secured, so that the right of homestead is cut off, the bankruptcy court has jurisdiction to order the bankrupt to deliver possession of the property to the purchaser, without driving the latter to a suit in ejectment. *Re Betts*, 93.
30. **ACCOUNTING FOR DEFICIT OR LOSSES.**—Where a deficit is shown in the assets of a bankrupt's estate, the bankrupt must account for it by a satisfactory explanation, or pay the amount of the deficit to the assignee. *In re Peltasohn*, 107.
In re Jacobi, 110, *note*.
31. **RENTS AND PROFITS, INTERVENING SALE, AND CONFIRMATION OF SALE OF PROPERTY.**—A mortgagee of real estate in Missouri, who becomes the purchaser thereof at a sale made by a trustee under a power of sale in the mortgage, in which sale the assignee in bankruptcy of the mortgagor joined, by an order of the bankruptcy court, was held, under the circumstances, entitled, as against the assignee in bankruptcy, to the rents and profits of the estate sold, for the period intervening between the day of sale and the date of the confirmation of the sale by the bankruptcy court. *Lathrop v. Nelson*, 194.

BANKS. See *National Banking Associations*.

1. **DEPOSITS.—WHEN A TRUST FUND.**—Deposits made with bankrupt bank to meet its checks in clearing-house held not a trust fund, but only to create the ordinary relation of debtor and creditor. *Phelan v. Iron Mountain Bank*, 88.
2. **DUTY OF BANK AS COLLECTING AGENT.**—A bank which acts as the collecting agent of another bank must use reasonable diligence and care, and if, in consequence of a failure to do so, a loss happens, it is liable. *Trinidad National Bank v. Denver National Bank*, 290.
3. **Same.—CASE IN JUDGMENT.**—The defendant bank received from the plaintiff bank a sight draft for collection, drawn by the plaintiff on a third bank against funds actually to the credit of the drawer; the defendant received this draft for collection January 10th, and transmitted it *directly* to the drawee, its correspondent, on the same day; it ought to have reached the drawee in two days; the drawee continued good until January 29th, when it failed; the drawee did not acknowledge the receipt of the draft, and in fact the draft miscarried and never reached the drawee; the defendant made no inquiries about it until February 9th; the plaintiff and defendant both supposed, meanwhile, that it had been paid; the defendant

BANKS—Continued.

gave the plaintiff no notice of any kind in respect to the draft until February 11th; the plaintiff sued the defendant for its negligent omission to give it notice: *Held*, that the defendant was liable: *Held*, also, that the usage or custom set up by the defendant, to the effect that it was not required to make inquiries concerning such remittances prior to receipt of the regular monthly statement of accounts between banks, was not established by the evidence, *Ib.*

4. *Same*.—DAMAGES.—Under the special facts, the measure of damages was the amount of the draft, *Ib.*

5. LIABILITY OF SURETY OF CASHIER HELD LIMITED TO OFFICIAL TERM.—Suit upon the official bond of the cashier of a savings bank, incorporated under the laws of Missouri. The statute provided that the officers of the bank should hold their offices for "one year, and until their successors are elected and qualified;" but the statute did not require a bond as part of the qualifications of such officers. A by-law passed by the directors required the cashier to give bond. Harris was elected cashier by the directors, and on January 16th, 1872, he gave a bond, conditioned for the "faithful discharge of his duty, in accordance with law, and the charter and by-laws of the bank." He was re-elected cashier, January 16th, 1873, but gave no new bond, and was allowed by the directors to continue to act without doing so: *Held*, that the sureties were not liable for the cashier's defaults in February and March, 1873. *Harris v. Babbitt*, 185.

6. *Same*.—His term of office was *annual*, and the sureties are not liable for defaults happening after another election the next year, and the lapse of sufficient time to qualify by giving a new bond, *Ib.*

7. DEPOSITS.—When creating relation of debtor and creditor, and when a trust fund, 88.

BELGIUM.

Extradition treaty of May 1, 1874, construed, 412, 415.

BILLS AND NOTES. See *Bankrupt Law; Banks*.

STATUTORY ILLEGALITY.—Where a statute declares absolutely and without exception that a contract or bond or note is void, it is void into whosoever hands it comes. *Anthony v. Jasper County*, 136.

BONDS. See *Banks; Louisville, etc., Canal Company; Municipal Bonds*.

1. Bond as an alternative of an injunction in suits against infringers of *patents for inventions*, 100, 448.
2. Official bond of *cashier* and extent of *surety's* liability, 185.

BRIDGE. See *Union Pacific Railroad Company*.

BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA.

1. **LIMITS OF LAND GRANT.—CONFLICTING GRANTS.—GRANT CONSTRUED.**—There are no *lateral* limits to the grant of lands made by congress (13 Stats. at Large, 356, sec. 19) to the defendant company; in this respect differing from other grants mentioned. *United States v. Burlington and Missouri River Railroad Company*, 297.
2. *Same.*—What lands are embraced in the description of the grant as being "*on the line*" of the said road defined, and the language held to mean that the lands shall be taken along a line parallel to the general direction of the road, on each side of it, and within lines perpendicular to its terminus at each end, *Ib.*
3. *Same.*—**PATENTS.—SETTING ASIDE OF.**—By the grant the company was entitled to patents for the lands earned "*on the completion of any consecutive twenty miles*" of its road: *Held*, that the company was not bound to apply for, or receive, its patents by sections of twenty miles as soon as completed, but might await the final completion of the road, and get all its lands at the same time: *Held*, also, patents will not be set aside where they represent only what the company was entitled to, even if they were issued too soon—the road being completed, and no injury having resulted to the government, *Ib.*
4. *Same.*—**CONFLICT OF GRANT WITH UNION PACIFIC COMPANY.**—Constructing the alleged conflicting grants to the defendant company, and the Union Pacific Railroad Company: *Held*, that the land department correctly decided that the title of the Union Pacific Railroad Company to lands within twenty miles of its road was paramount to the title of the defendant company, *Ib.*
5. *Same.*—**ANNULLING PATENT BY DECREE.**—There was no authority in the grant to issue patents for land on the *north* side of the defendant's road, in lieu of lands deficient on the *south* side of its road, and such patents are void. But, in a bill to have such patents declared null, the lands must be described or identified, *Ib.*

CANAL. See *Louisville and Portland Canal Company*.

CASHIER. See *Banks*.

Liability of *surety* of cashier on his official bond, 185.

CHATTEL MORTGAGE. See *Bankrupt Law*.

CHEROKEE NEUTRAL LANDS.

Rights of actual settlers under the treaty of July 19, 1866, and amendments, 391, 396.

CIRCUIT COURT. See *Abatement*; *Bankrupt Law*; *Colorado*; *Removal of Causes*.

CIRCUIT COURT—Continued.

1. JURISDICTION.—AMOUNT.—Assignees in bankruptcy may sue in the circuit court without reference to the amount in dispute. *Payson v. Coffin*, 386.
2. JURISDICTION.—AMOUNT IN DISPUTE HOW DETERMINED.—To give the circuit court jurisdiction, the matter in dispute must exceed, exclusive of costs, the sum of \$500, and, in actions upon a money demand, the court, in passing on the question of jurisdiction, will look to the amount stated in the body of the complaint, and will not be governed alone by the amount in the prayer for judgment. *Culver v. Crawford County*, 239.
3. *Same.* In a suit seeking to recover an amount that is not fixed, and which amount can be ascertained only by trial, the plaintiff can obtain a standing in court by laying his damages at the requisite sum. *Ib.*
4. Jurisdiction in *Bankruptcy*. See *Bankrupt Law*.
5. Jurisdiction over *Military Reservation* of Fort Leavenworth. *Ex parte Hebard*, 380.
6. Power of a justice of the supreme court to award injunction in a circuit to which he is not assigned. *United States v. Louisville, etc. Canal Company*, 601.

CITY. See *Municipal Bonds*; *Municipal Corporations*; *Wharfage Tax*.

CITIZENSHIP. See *Constitutional Law*; *Naturalization*.

CLERK.

Commissions to clerks for receiving and paying out money. Revised Statutes, section 828, construed. *In re Goodrich*, 230.

COLORADO.

1. CASES REPORTED from district of Colorado, 250–295.
2. EFFECT OF ADMISSION AS A STATE ON PENDING SUITS.—The effect the admission of the territory of Colorado as a state, and the erection of federal courts therein (Act of June 26, 1876), and the extension of the laws of the United States over the same, was, *ipso facto*, to extinguish the territorial government, and the territorial courts as courts of the general government. *Ames v. Railroad Company*, 251.
3. *Same.*—By special provisions in the enabling act and the constitution of the state, the territorial courts, on the admission of the state, became the provisional and temporary courts of the state. *Ib.*
4. *Same.*—The above mentioned act of June 26, 1876, makes provision for the disposition of all cases pending in the territorial courts at the time of the admission of Colorado into the Union; cases of federal character are transferred to the proper federal court; other cases to the state courts. *Ib.*

COLORADO—Continued.

5. SUPREME COURT OF TERRITORY.—*Cases of a federal character* pending on appeal or writ of error in the supreme court of the territory at the time of the admission of the state, may be heard and decided in the proper federal court created by said act, which may affirm the judgment below, or reverse it and order a new trial in the federal court, and in either case enter final judgment. *Bates v. Payson*, 265.
6. *Same*.—HOW FEDERAL CHARACTER MUST APPEAR.—The federal character of the cause must appear in the pleadings, or of record; if it does not thus appear, the state court may lawfully proceed therein, and its action will be valid. *Ames v. Railroad Company*, 251.
7. Where the *federal jurisdiction* depended on citizenship, and the requisite citizenship to give federal jurisdiction did not appear of record, the party who does not reveal such citizenship, but after the admission of the state proceeded actively in a cause pending in the local courts, was held to have made his election under the act of June 26th, 1876, to remain in the state court. Whether such election would preclude the party from taking a transfer of the cause under the general removal acts, *quære?* *Id.*
Ames v. Col. Cent. R. R. Co., 260; *Gaffney v. Gillette*, 265.
8. EXECUTION IS A LIEN on goods from the time it is delivered to the officer to be executed. *Bartlett v. Russell*, 267.
9. POWER OF FOREIGN CORPORATIONS to take mortgages in Colorado. *Life Insurance Company v. Overholt*, 287.

COMMISSIONS.

1. To clerk, under section 328, Revised Statutes, for receiving and paying out moneys. *In re Goodrich*, 230.
2. To assignee in bankruptcy, 131.

COMPOSITION AGREEMENT. See *Bankruptcy*.

CONSOLIDATION OF CAUSES.

1. Of indictments. *Peters, Ex parte*, 169.
2. CIVIL SUITS.—Where a number of suits of a like nature, and involving the same issues, are pending at the same time, the court may, in its discretion, order that one case be tried and determined as a test case for all, or that the several causes be consolidated and tried together. This rule applies as well to cases in equity as at law. *Andrews v. Spear*, 470.

CONSPIRACY. See *Bankrupt Law*; *Criminal Law*; *Former Recovery*.CONSTITUTIONAL LAW. See *County Warrants*; *Municipal Bonds*; *Taxes*; *Wharfage Tax*.

1. FEDERAL CONSTITUTION.—FORTS, ETC.—JURISDICTION.—Section 8 of article I of the constitution of the United States, construed; and it

CONSTITUTIONAL LAW—Continued.

- was held that, whenever the United States is the owner of the land it uses as a fort, etc., the legislature of the state may permit congress to exercise exclusive jurisdiction over such land. *Ex parte Hebard*, 880.
2. **TONNAGE DUTY** cannot be laid without consent of congress; but a city ordinance imposing wharfage dues, to be ascertained by the tonnage of vessels, was sustained. 10.
 3. **VESTED RIGHTS.—TAKING PRIVATE PROPERTY.**—Congress cannot destroy vested rights, and take private property for public use without compensation. *United States v. Louisville, etc. Canal Co.* 601.
 4. **CITIZENSHIP.—NATURALIZATION.—RIGHT TO VOTE.**—Citizenship and the right to vote are neither identical nor inseparable; and the constitution of Minnesota, although it authorizes resident unnaturalized foreigners to vote at state elections and hold office, does not make them citizens of the state, and such persons *may remove causes* to the circuit court of the United States on the ground that they are aliens, although they have resided in the state for many years, and voted at elections, as authorized by the state constitution, or held office under the laws of the state. *Lanz v. Randall*, 425.
 5. **REVENUE LAWS OF THE STATES.**—Where an act of the legislature is susceptible of two interpretations, one of which will overthrow the act or make it unconstitutional, and the other will support the act and give it effect, the latter is to be adopted by the judicial branch of the government. This principle is one which commends itself to the federal courts with great force, in all cases where they are called upon to expound and apply state legislation, and especially so where they are asked to overthrow the revenue laws of the states. *St. Louis National Bank v. Papin*, 29.
 6. **NORMAL SCHOOL ACT OF MISSOURI.**—The act of the legislature of Missouri, entitled "An act to aid in the establishment of normal schools," approved March 19th, 1870, is constitutional and valid. *Briggs v. Johnson County*, 148.
 7. *Same.*—This act neither violates the principles of equal taxation, nor falls within the constitutional prohibition regarding special legislation. *Ib.*
 8. **SPECIAL ASSESSMENTS FOR LEVEES.**—A state may impose special assessments on districts for the purpose of building levees, etc., by virtue of its police power; such an assessment is not in conflict with the constitutional provision requiring equal and uniform valuation of all property for taxation. *Boro v. Phillips County*, 216.

CONTEMPT. See *Receiver*.

CONTRACTS. See *Banks; Bills and Notes; County Warrants; Municipal Bonds*.

CONTRACTS—Continued.

1. **CONTRACTS BY TELEGRAPH.—ACCEPTANCE.—WHEN COMPLETE.**—In “contracts by telegraph” the same rules as to acceptance prevail as in contracts by mail; the contract is completed when an acceptance of the proposition is deposited for transmission in the telegraph office. *Minnesota Oil Company v. Collier Lead Company*, 431.
2. *Same.*—**DELAY IN ACCEPTING.**—In case of a proposition by telegraph for the sale of certain goods, the market for which was subject to sudden and great fluctuations, an immediate answer should be returned, and an acceptance of such proposition telegraphed after a delay of twenty-four hours from the time of its receipt was not an acceptance within a reasonable time, and did not operate to complete the contract, *Ib.*
3. Relief against *fraudulent contract* made by the officers of a corporation in their own interest. *Wardell v. Union Pacific Railroad Company*, 330.
4. **CONFLICT OF LAWS.—WHAT LAW GOVERNS.**—The rule that a contract shall be judged by the law of the place in which it is made is not applicable to real estate, which can be conveyed only according to the law of the place in which it is situated. *Life Insurance Company v. Overholt*, 287.

CORPORATIONS. See *Banks; Bankrupt Law; County; Municipal Corporations; Louisville and Portland Canal Company; Railroads.*

1. **INJUNCTION.—STATE COURT.**—In a stockholder's bill an injunction was refused to stay proceedings in a court of the state. *Chaffin v. St. Louis*, 19.
2. *Same.*—**CONCLUSIVE EFFECT OF JUDGMENT.**—The United States circuit court will not entertain a bill in equity by a non-resident stockholder of a domestic corporation, where it appears that the issues raised by the bill have been already adjudicated in a suit brought in the state court between the corporation and the proper adversary parties, and litigated there without fraud or collusion. *Chaffin v. St. Louis*, 24.
3. **CONFLICT OF LAWS.—POWER TO TAKE MORTGAGES.**—The statute of the territory of Colorado provided that foreign corporations should file a copy of the charter, or other evidence of their incorporation, within thirty days after commencing business in the territory, but contained nothing to indicate that this was a condition on which they might continue in business. But it did provide a penalty against the officers for a failure to file such evidence: *Held*, that, though the complainant had failed to comply with the statute in respect to such filing, it was yet capable of taking a mortgage on real estate in the late territory, and that no prohibition to continue in business could be implied from these enactments. *Northwestern Mutual Life Insurance Company v. Overholt*, 287.

CORPORATIONS—Continued.

5. **FRAUDULENT CONTRACT BY OFFICER.—RELIEF AGAINST.**—A contract made on behalf of a corporation by the executive committee of the board of directors with a third person, in which the members of the executive committee have a secret interest, is fraudulent as against the corporation, and the corporation may repudiate it, although it may have long been acted upon and recognized by the officers of the corporation who made it. *Wardell v. Union Pacific Railroad Company*, 330.
5. *Same.*—Accordingly, a contract made by the Union Pacific Railroad Company with a person who afterwards organized with others and formed a corporation called the Wyoming Coal and Mining Company, by which the former company conveyed the right to prospect for coal upon its line to the latter for fifteen years, agreeing to purchase coal needed for its use for the said term, from the latter, at prices named in the contract, was set aside on the ground of fraud, the officers of the Union Pacific Railroad being shown to have been jointly interested with the other party to the contract. *Ib.*
6. *Same.*—**TERMS OF RELIEF.—ACCOUNTING.**—After such a contract had been acted on for some years, the railroad company, on a change of management, having become the owner of nine-tenths of the stock of the coal company, forcibly took possession of the property of the latter company. On a bill filed by the owner of the one-tenth of the stock (he being the person with whom the fraudulent contract was made), the court decreed the contract to be fraudulent, and laid down the principles on which an accounting should be had between him and the railroad company, *Ib.*
7. **BANKRUPTCY** proceedings against. See *Bankrupt Law*.
8. Mortgage by canal corporation of *revenues and tolls*. 601.

COSTS. See *Fees*.

COUNTY. See *County Warrants*; *Municipal Bonds*.

1. **LEEVE BONDS IN ARKANSAS.**—The county being divided into several levee districts, each of which is to pay its own obligations for work done within the district, the obligations, although made payable by the levee treasurer of the county, are payable only out of the funds of the district in which the work was done, and cannot be made the foundation of an action against the county for a money judgment. *Boro v. Phillips County*, 216.
2. *Same.*—The general rule of law that “where one takes a benefit from the result of another’s labor, he is bound to pay for the same,” does not, as against the county, apply to cases where the benefit of the work is immediately to the adjacent property, and only incidental to the county at large, *Ib.*

COUNTY—Continued.

3. *Same*.—When the county court merely acts as an agent for a district, and by law it is made the duty of the county court to assess a tax on the lands of the levee district to pay for the work, upon a failure or refusal on the part of the county court to discharge its duty in the premises, *mandamus* is the proper remedy, but such failure or refusal will not make the county liable to a *general* judgment for the obligations of the district, *Ib.*

COUNTY WARRANTS. See *County*.

1. NOT COMMERCIAL PAPER.—DEFENCES.—Warrants issued by counties in Arkansas are not commercial paper, free from legal and equitable defences in the hands of a subsequent holder, but such holder takes them subject to such defences. *Shirk v. Pulaski County*, 209.
2. OVER-ISSUE.—Under the laws of Arkansas, warrants issued for more than the sum actually due a claimant in order to make the warrant worth in money the amount of the debt due from the county, are void as to the excess, and may be defended against accordingly. The act of the county authorities, in auditing the claim and issuing the warrants, is not conclusive, as a judicial determination, upon the parties, *Ib.*
3. ASSIGNMENT.—RIGHTS OF HOLDER.—Under the circumstances, the court treated the holders of such warrants as the equitable assignees of the valid legal claim of the payee, or of the holder's proportionate share of such claim where several warrants were issued therefor, subject to any payments the county may have made to any holder of a warrant representing a portion of such claim, *Ib.*
4. LOCAL STATUTE.—The statutes of Arkansas, as to calling in warrants "in order to cancel, reissue, and classify the same," construed, *Ib.*
5. CONSTITUTION.—Construction of constitutional provision in Arkansas as to rights and remedies of warrant-holders, 215, 224, 233.
6. MODE OF ENFORCEMENT.—Payment of judgments rendered on ordinary warrants issued by counties in Arkansas, can only be enforced in the manner provided by the constitution and laws of the state. *United States v. Miller County*, 233.
7. RIGHTS AND REMEDIES.—The present *constitution* of Arkansas, as to the rights and remedies of the holder of such warrants, distinguishes between warrants issued before and those issued after its adoption, *Ib.*
8. *Same*.—A relator, whose judgment is based on county warrants issued *after* the adoption of the present constitution, is not entitled to the levy of a tax to pay such judgment in excess of the constitutional limitation, nor to have part of the general tax specially

COUNTY WARRANTS—Continued.

appropriated and set aside to pay such judgment. *Aliter*, as to judgments on negotiable bonds issued under acts which require or authorize the levy of a special tax to pay them, and as to judgments upon warrants issued *prior* to the adoption of the present constitution of the state, *Ib.*

9. LEVY BONDS.—How enforced and who liable to pay the same in Arkansas. *Boro v. Phillips County*, 216.

COURTS. See *Abatement*; *Bankrupt Law*; *Circuit Court*; *District Court*; *Indians*; *Removal of Causes*; *State Court*.

CRIMINAL LAW. *Bankrupt Law*; *Habeas Corpus*.

1. REMISSION OF INDICTMENT. — ORIGINAL.—COPY.—The legislation of congress (Rev. Stats. sec. 1037) authorizing the district court, by order entered on its minutes, to remit any indictment pending therein to the circuit court, does not require that the clerk of the district court shall transmit the *original* indictment, but an exemplification of the record, including a certified *copy* of the indictment. *United States v. McKee*, 1.
2. *Same*.—ARREST OF JUDGMENT.—WANT OF PREJUDICE.—Where a record copy of the indictment was transmitted to the circuit court, to which no objection was made by the defendant, who pleaded thereto, and went to trial thereon, and was convicted, the original indictment remaining on the files of the district court, it was held that even if the original indictment, instead of a copy, should have been sent, this was waived by the defendant, and under the remedial provisions of the statute (Rev. Stats. sec. 1025), the defendant not having been prejudiced, was not entitled to have the judgment arrested. *Ib.*
3. PARDON.—Effect of pardon. *United States v. McKee*, 128.
4. ESTOPPEL.—FORMER JUDGMENT.—Judgment in criminal case held a bar to a subsequent civil suit for a penalty for the same offence. Revised Statutes, sections 3296, 5440, construed. *Ib.*
5. CUMULATIVE JUDGMENTS.—The petitioner for the writ of *habeas corpus* entered a general plea of guilty, in the district court, to an indictment containing four counts, and setting forth at least two distinct offences of a similar character, and was sentenced to two years imprisonment upon each count, each term commencing at the expiration of the preceding term; after two years, but before the expiration of four years, he applied to be discharged on *habeas corpus*, on the ground that the court had no authority to render cumulative judgments: *Held*, that the judgment of the court, when collaterally assailed, was not wholly void, and was good to the extent of four years imprisonment at least. *Ex parte Peters*, 169.
6. JOINDER OF OFFENCES.—Section 1024 of the Revised Statutes, as to the joinder of offences in the same indictment, construed. *Ib.*

CRIMINAL LAW—Continued.

7. BANKRUPT ACT.—Conspiracy to commit acts made penal by the bankrupt act. Revised Statutes, sections 5182, 5440, construed. *United States v. Bayer*, 407.
8. CONSPIRACY TO DEFRAUD.—REQUISITES OF INDICTMENT.—REVISED STATUTES, SECTION 5440, CONSTRUED.—Requisites of an indictment for conspiracy to defraud the United States, under section 5440 of the Revised Statutes, considered; and that section held not to extend to a case where the contemplated fraud depends entirely upon the passage of a *future* act of congress to make it effective. *United States v. Crafton*, 145.
9. FALSE CLAIMS AGAINST THE UNITED STATES.—REVISED STATUTES, SECTION 5438.—Section 5438 of the Revised Statutes, prohibiting the making or presenting of false claims and bills against the general government, construed. *Ex parte Shaffenburg*, 271.
10. *Same*.—This statute distinguishes between the *making* and the *presenting* of a false claim, and makes each a distinct offence. *Ib*.
11. *Same*.—A false account made by a marshal within the limits of Colorado, and presented to the court and approved in Colorado, and afterwards presented to the treasury department in Washington, is a complete offence as to the *making* in Colorado, for which the offender may be there indicted. *Ib*.
12. CUTTING TIMBER.—The cutting of timber upon the public lands is a criminal offence (Rev. Stats. sec. 2461), and the government may proceed both civilly and criminally. *Bly v. United States*, 464.

DAMAGES.

1. PUBLIC LANDS.—WILFUL TRESPASS.—MEASURE OF DAMAGE.—Where timber is cut upon the public lands wilfully, fraudulently, or negligently, and without authority, and made into saw-logs, the government may replevy such logs even when they have reached the boom, or, at its election, may sue in trover for their value; and in either case may recover without deduction for their enhanced value after severance from the freehold, arising from the labor of the wrong-doer. In such case the government is not confined to the "stumpage" value.
2. Whether a different rule of damages would apply if the trespass were neither wilful, fraudulent, nor negligent, *quære?* *Bly v. United States*, 464.
3. ORES.—TENANT IN COMMON.—Rule of damages for ores taken by a tenant in common, 469, *note*.
4. NEGLIGENCE OF BANK AS COLLECTING AGENT.—Measure of damages where a bank, acting as a collecting agent, negligently fails to do its duty. *Trinidad National Bank v. Denver National Bank*, 290.

DEDICATION. See *Keokuk; Streets*.

DEMAND FOR TAXES. See *Internal Revenue*.

DEPOSIT OF TITLE DEEDS. See *Equitable Mortgage*.

DEPOSITS. See *Bankrupt Law*; *Banks*.

DEPOT.

1. Right to erect railway depot buildings in the streets of a city in Iowa. *Barney v. Keokuk*, 593.
2. Right to erect passenger and freight depot buildings on public land ing and street, on navigable river, to accommodate the interests of navigation. *Ib.*

DES MOINES RIVER LANDS. See *Iowa*; *Occupying Claimant*.

1. SETTLERS' RIGHTS under Iowa Occupying Claimant's Act. *Litchfield v. Johnson*, 551.
2. REMOVAL OF CAUSES.—Right to remove from state to federal court the petition of the occupying claimant. *Chapman v. Barger*, 557.

DIRECTOR. See *Corporation*.

DISPATCHES. See *Telegraph Company*.

DISTRICT COURT. See *Admiralty*; *Bankrupt Law*; *Circuit Court*.

- Power to remit, and mode of *remission of indictments* to circuit court.
United States v. McKee, 1.

DOWER.

1. IOWA STATUTE.—ADULTERY.—The statute of Westminster 2, 13 Edw. 1, ch. 34, making adulterous elopement of the wife a bar to dower, is not in force in Iowa, being inconsistent with the legislation of the state in relation to the descent of property, dower, and adultery. *Smith v. Woodworth*, 584.
2. RELEASE.—CONTRACT FOR RELEASE OF.—The special *verbal contract* between the wife and husband, set out in the plea, in respect to release of dower, *held*, on demurrer, not to bar her action for dower, or the statutory substitute therefor. *Ib.*

DRIVE WELLS. See *Patents for Inventions*.

EARNINGS. Pledge of. See *Lien*.

EASEMENT. See *Streets*.

EJECTMENT. See *Streets*.

ELECTIONS.

Preliminary to issue of municipal securities. See *Municipal Bonds*.

EMINENT DOMAIN.

Power of congress to take private property without compensation denied by MILLER, J. *United States v. Louisville, etc. Canal Co.* 591.

EQUITY. See *Corporation*; *Injunction*.

1. **SUIT TO QUIET TITLE.**—**IOWA STATUTE.**—An action brought under the Iowa statute to quiet title, is, in its essence, an equity suit, and must be brought and heard as such. *Balmear v. Otis*, 558.
2. **SPECIFIC PERFORMANCE** of contract, to *renew lease* where rental is to be fixed by third persons, and of agreements to arbitrate, 55, 56, *note*.

EQUITABLE MORTGAGE. See *Mortgage*.

ENROLLMENT OF VESSELS. See *Admiralty*.

ERRORS OF FORM.

In criminal cases—remedial provision. Section 1025 Revised Statutes construed, 1.

ESTOPPEL. See *Former Recovery*; *Municipal Bonds*.

EVIDENCE.

1. **OFFICIAL PLATS IN LAND OFFICE.**—In civil and criminal actions by the United States against trespassers upon its unsold timber land, *Held*, that the official plats and books in the office of the register of the United States land office are admissible as evidence on its behalf to show that the land on which the timber was cut had not been sold by the United States. *Bly v. United States*, 484.
2. **SWAMP LAND.**—**PAROL EVIDENCE.**—Parol evidence is not admissible on behalf of the defendants to show that the *locus in quo* was swamp land within the meaning of the swamp land grant to the several states, *Id.*

EXECUTION.

WHEN IT BECOMES A LIEN ON PERSONALTY.—The statute of Colorado provides that “no writ of *fiery facias*, or other writ of execution, shall bind the estate of the defendant but from the time such writ is delivered to the sheriff or other proper officer to be executed.” Under this statute, an execution on a judgment is a lien on the debtor's property from the time it is delivered to the sheriff to be executed, which will be protected in bankruptcy, and will not be defeated by a petition in bankruptcy, filed after the delivery but prior to the levy of the execution. *Bartlett v. Russell*, 267.

EXTRADITION. See *Habeas Corpus*.

1. **EXTRADITION.**—**TREATY WITH BELGIUM.**—**WARRANT OF ARREST.**—The sixth article of the treaty of May 1st, 1874, between the United States and Belgium, expressly provides for requisition on the part of the government applying, and consent of the government applied to. It is not necessary that the warrant on such requisition be issued by the president. It is sufficient if it issue from the state

EXTRADITION—Continued.

- department, under its official seal. In foreign relations, and executive acts imposed by treaty stipulations, the president acts through that department. *Ex parte Van Hoven*, 412, 415.
2. *Same*.—It is no ground of discharge of the alleged fugitive, on *habeas corpus*, that the warrant of arrest was issued by the proper judicial officer instead of the president, *Ib.* 415.
 3. SUFFICIENCY OF COMPLAINT.—WARRANT.—Where the complaint charges the crime of forgery as having been committed on a certain day in the jurisdiction of the foreign government, in that one "wilfully, etc., uttered and put in circulation forged or counterfeit papers, or obligations, or other titles, or instruments of credits," without specifying the kind of obligations forged, or the character of the papers, or nature of titles, etc., it is defective at common law, does not fairly inform the accused of the charge, and does not show probable cause for arrest, *Ib.* 412.
 4. *Same*.—It need not appear by distinct recital in the mandate of the secretary of state to the judicial officers of the government, that a warrant for the arrest of the alleged fugitive, for the crime imputed to him, ever issued in Belgium. The judicial department will presume from the mandate of the secretary of state that this was done, *Ib.* 415.
 5. *Same*.—A complaint, under oath, made by the consul-general of Belgium, before a proper commissioner in the southern district of New York, upon the strength of telegrams and depositions taken in Belgium, held sufficient to justify the court in remanding the prisoner for examination by the commissioner before whom the complaint was made and who issued the warrant of arrest, *Ib.* 415.

FEDERAL AND STATE COURTS. See *Bankrupt Law*; *Circuit Court*; *District Court*; *Mandamus*; *Removal of Causes*; *State Courts*.

FEES.

1. POUNDAGE TO CLERK.—REVISED STATUTES, SECTION 828.—The one per cent commission allowed to the clerk, "for receiving, keeping, and paying out money, in pursuance of any statute or order of court" (Rev. Stats, sec. 828), implies that the money shall be actually received, kept, and paid out by him, and is his compensation for such services. *In re Goodrich*, 230.
2. *Same*.—The clerk is not, at least in general, entitled to such commission on moneys which, although ordered to be, are not, in fact, paid into his hands, *Ib.*
3. *Same*.—A party adjudged to pay money, may pay it to the party entitled, or his attorney of record, and the clerk or register will not, in such case be, entitled to commission or poundage; but if he pays to the clerk, he does the act which entitles the clerk to his

FEEs—Continued.

commissions, and must, as a rule, pay the same, and the amount cannot be taxed against the other party. See *Upton v. Tribblecock*, note, *Ib.*

FELONIES. See *Criminal Law*.

FIERI FACIAS.

When it becomes a lien on personalty, 267.

FINAL DECREE. See *Appeal*.

Appeals from final decrees and the right to execute the same where there is no supersedeas, 531, 546, 548, note.

FLEEING FROM JUSTICE. See *Extradition*.

FORECLOSURE. See *Appeal*; *Mortgage*; *Railway Mortgage*.

FOREIGN JUDGMENT. See *Judgment*.

FOREIGN LAWS. See *Contract*.

FOREIGN PORT. See *Admiralty*.

FORMER JUDGMENT. See *Former Recovery*.

FORMER RECOVERY.

1. **CIVIL SUIT FOR PENALTIES HELD BARRED BY CRIMINAL JUDGMENT FOR SAME OFFENCE.**—The defendant was indicted, convicted, and punished under section 5440 of the Revised Statutes for conspiring with certain distillers to defraud the United States, by the unlawful removal of distilled spirits from their distilleries, without the payment of taxes (3 Dillon, pp. 546-551; *ante*, p. 1). In the present suit he was sued *civilly*, under section 3296 of the Revised Statutes, to recover the *penalty* of double the amount of taxes of which the government had been defrauded by means of the said conspiracy, the two transactions being the same. It was held that the present suit for the penalty was barred by the judgment in the criminal case. *United States v. McKee*, 128.
2. Effect of pardon. *Ib.*

FORT LEAVENWORTH. See *Military Reservation*.

FRAUD. See *Corporation*; *Criminal Law*.

FRAUDULENT CONVEYANCE. See *Bankrupt Law*.

GAMBLERS.

Power of railways to exclude from cars. *Thurston v. Union Pacific Railroad Company*, 321.

GUARDIAN'S SALES.

1. **LEGISLATION OF NEBRASKA CONSTRUED.**—The legislation of the state of Nebraska, as respects sales of real estate by guardians, considered, and the principles of *Grignon's Lessee v. Astor*, 2 How. 319, adopted and applied. *Miller v. Sullivan*, 340.
2. *Same.*—**LIMITATION.**—The special five years statute of limitations for the protection of the rights of a purchaser of land at a guardian's sale, is available to the holder of the title thus acquired, even though the sale by the guardian might not be good if it had been attacked within the five years. *Ib.*

HABEAS CORPUS. See *Extradition*.

1. **CUMULATIVE JUDGMENTS.**—Application for discharge on the ground that the court had pronounced cumulative judgments on the petitioner, denied. *Peters, Ex parte*, 169.
2. **SUFFICIENCY OF COMPLAINT** under extradition treaty with Belgium, 412, 415.
3. **PRACTICE.**—Where all the facts are before the court, and are not disputed, the case may be decided on the application for the writ, as well as on a return to the writ when issued. *Ex parte Hebard*, 380.
4. **CUSTODY UNDER STATE AUTHORITY.**—A person indicted in a state court for an act done in pursuance of a law of the United States may be discharged from custody under such indictment, on a writ of *habeas corpus*, issued by a federal court or judge, under section 753 of the Revised Statutes of the United States. *In re Bull*, 323.
5. *Same.*—**KIDNAPPING.—EXTRADITION.**—The relators were indicted in a state court for kidnapping, and were in custody under such indictment; they applied to a federal judge for a writ of *habeas corpus*, stating, in their petition for the writ, that they were indicted for acts done by them under sections 5278 and 5279 of the Revised Statutes of the United States, in executing a requisition for the surrender of the person alleged to have been kidnapped as a fugitive from justice; it appearing to the circuit court, on appeal, that this claim of the relators was not true: *Held*, that they were not entitled to be discharged, and the order of the district judge of the district, discharging the relators, was reversed. *Ib.*
6. **AN ERRONEOUS DECISION** of a court, having jurisdiction of the offence and of the person indicted, cannot be re-examined on *habeas corpus*. *Ex parte Shaffenburg*, 271.
7. **INDICTMENT** for fraudulent claims against the government. Jurisdiction. Revised Statutes, section 5438, construed. Discharge on *habeas corpus*, *Ib.*

HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

1. **TAXATION.—JUDGMENT OF STATE SUPREME COURT.**—The judgments of the supreme court of Missouri, construing the charter of the

HANNIBAL AND ST. JOSEPH RAILROAD CO.—Continued.

Hannibal and St. Joseph Railroad Company as to the taxation of the company's property, adopted and followed. *Moore v. Holliday*, 52.

2. *Same*.—RETROSPECTIVE TAXATION.—Under special circumstances, a temporary injunction to restrain the collection of retrospective taxes on the company's property, for all the years between 1860 and 1871, was allowed, and in all other respects denied. *Ib*.

HOME PORT. See *Admiralty*.

HOMESTEAD EXEMPTION. See *Bankrupt Law*.

HUSBAND AND WIFE. See *Dower*; *Insurance*.

INCUMBRANCE.—See *Admiralty*; *Mechanics' Lien*; *Lien*; *Mortgage*; *Railway Mortgage*; *Taxes*.

INDIANS.

1. TAXABILITY of lands patented under treaty with Miami Indians, 370.
2. JURISDICTION.—PROBATE COURTS.—Without the assent of the general government, the probate courts of a state have no jurisdiction to administer upon the property or credits of Indians, who were members of a tribe which maintains towards the United States its tribal relations. *United States v. Payne*, 387.
3. *Same*.—VOID GRANT OF ADMINISTRATION.—LIABILITY OF ADMINISTRATOR.—The grant of administration on the estate of a member of the Pottawattamie tribe of Indians, by a probate court in Kansas, by virtue of the treaty of 1867 (15 Stats. at Large, 536, art. VIII. of senate amendments), when such member is in fact alive, is void as respects the administrator; and money paid to him by the United States in that capacity may be recovered back. *Ib*.
4. TREATY respecting "Cherokee Neutral Lands," 391, 396.

INDICTMENT. See *Criminal Law*.

1. REMISSION of, in criminal cases, from the district to the circuit court. *United States v. McKee*, 1.
2. JOINDER OF OFFENCES.—What offences may properly be joined. Revised Statutes, section 1024, construed, 169.

INFANT. See *Guardian's Sales*.

INFORMATION. Sufficiency of complaint under extradition treaty with Belgium, 412, 415.

INJUNCTION. See *Landlord and Tenant*.

1. SUPREME COURT JUSTICE OUT OF HIS CIRCUIT.—Where the judge of the district court for the district where a bill in equity is brought,

INJUNCTION—Continued.

and the circuit judge for the circuit, and the judge of the supreme court allotted to that circuit, are all absent from the district and circuit, another justice of the supreme court has jurisdiction, at any place in the United States, to hear an application for an injunction, notwithstanding the act of congress of June 1, 1872. [See Rev. Stats. sec. 719.] *United States v. Louisville and Portland Canal Company*, 601.

2. **UNITED STATES AS PLAINTIFF.**—As to the right of the United States to bring an injunction bill, in the proper circuit court, to protect improvements which she is making under the authority of congress, in navigable waters, from injury which will be caused by acts done by state authority. *United States v. Louisville, etc. Canal Company*, 601.
3. **TO STATE COURTS.**—The federal courts are prohibited, except in certain cases in bankruptcy, from granting “the writ of injunction to stay proceedings in any court of a state” (Rev. Stats. sec. 720); and in this case such injunction was refused at the instance of a stockholder in a corporation where the state court had determined the questions sought to be litigated in a suit against the stockholder's corporation, without objection from the stockholders. *Chaffin v. St. Louis*, 19.
4. **TAXATION OF NATIONAL BANKS.**—Shares in national banks being taxable, and no excessive valuation being complained of, equity will not restrain the collection of the taxes, though the assessing officers may have arrived at a correct result by some erroneous method. *St. Louis National Bank v. Papin*, 29.
5. **Injunction against collection of taxes**, 29, 35, 41, 52,
6. **Injunction to restrain the collection of taxes** from the Hannibal and St. Joseph Railroad Company denied except under special circumstances as to certain retrospective taxes. *Moore v. Holliday*, 52.
7. **REMEDY of tax-payer against an illegal tax assessed by the United States**, 66.
8. **PATENT CASES.**—The principles which guide the courts in granting or refusing injunctions in patent cases, considered by MILLER, circuit justice. (See *Patents for Inventions*.) *Am. Middelings Purifier Co. v. Christian*, 448.

INSURANCE (LIFE).

1. **MISSOURI ACT OF 1874 CONSTRUED.**—The act of the legislature of the state of Missouri of March 23d, 1874, in respect of misrepresentations in policies of life insurance, extends to all policies delivered in the state after the act went into effect. *White v. Insurance Company*, 177.
2. *Same.*—Where the provisions of that act are in conflict with the provisions of the policy, the act controls the policy, *Id.*

INSURANCE (LIFE)—Continued.

3. *Same.*—**WAIVER.**—Whether the applicant for insurance may waive the benefit of the act, *quære*; but no such waiver arises by implication, *Ib.*
4. **EXTENT OF ACT.**—The act extends to warranties as well as to representations, *Ib.*
5. **THE PURPOSE AND POLICY** of the act expounded, *Ib.*
6. *Same.*—The act does not extend to cases where *false and fraudulent representations* have been purposely made to procure the policy, *Ib, note, 184.*
7. **POLICY TO WIFE ON HUSBAND'S LIFE.**—**MISSOURI STATUTE.**—The plaintiff, a married woman, domiciled in Missouri, through her husband, applied for and received from a Kansas life insurance company, doing business in Missouri, a policy of insurance on the life of her husband, of which the annual premium exceeded \$300; the policy, by its terms, was payable, on the death of her husband, *to the plaintiff*: *Held*, that, under the Missouri statute (2 Wag. Stats. p. 936, sec. 15), the policy was not void, because the annual premium exceeded \$300. *Smith v. Life Insurance Company, 353.*
8. *Same.*—**DEFENCE.**—The company cannot set up, to defeat the right of action in the plaintiff, that all or some part of the recovery money, under the statute of Missouri, would be held in trust for the estate or creditors of her husband, *Ib.*
9. *Same.*—**RIGHT OF ACTION.**—**PLAINTIFF.**—The right of action was in the plaintiff, and not in the administrator of the husband, *Ib.*

INTEREST. See *Bankrupt Law*; *National Banking Associations*; *Usury*.

INTERNAL IMPROVEMENTS. See *Municipal Bonds*.

INTERNAL REVENUE. See *Taxes and Taxation*; *United States*.

1. **LIEN.—DEMAND.—SUFFICIENCY OF DEMAND.**—The internal revenue act of July 13, 1866 (14 Stats. at Large, 104; Rev. Stats. sec. 3186), provides, in reference to certain taxes, that if any person liable to pay the same "neglects or refuses to pay them after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with interest, penalties, and costs, upon all property and rights of property belonging to such person:" *Held*,
 1. That a demand is necessary to create and bring into operation this lien. 2. It is essential to such a demand that it should state the amount of the tax and demand payment thereof. 3. That each of the three several demands here alleged was insufficient to create the lien. *United States v. Pacific Railroad, 71.*
2. **Recovery of penalties**; effect of *prior judgment* in criminal proceeding; effect of *pardon*. *United States v. McKee, 128.*

INVENTIONS. See *Patents for Inventions*.

IOWA.

1. CASES REPORTED from the district of Iowa, 478, *et seq.*
2. TAXATION of the Missouri river bridge of the Union Pacific Railroad Company by state authority, 497.
3. "OCCUPYING CLAIMANT ACT" construed, 551, 558.
4. REMOVAL OF CAUSES.—TRIAL TERM.—Iowa statute in respect to time for the *trial of actions* as affecting the time when a petition for the *removal of causes* to the federal court must be filed under the act of March 3, 1875, 559, 563, 566.
5. MECHANIC'S LIEN on railways; relative rights and priorities of mechanics and mortgagees under the legislation of Iowa, 570.
6. RIGHT of *railways to occupy streets* under the legislation of Iowa. *Barney v. Keokuk*, 593.
7. DOWER in Iowa as affected by the *adultery* of the wife, 584.

JOINDER.

Of offences in same indictment. Revised Statutes, section 1024, construed. *Ex parte Peters*, 169.

JUDGES. See *Courts*.

Power of supreme court justice to grant injunction out of his circuit, and in cases not arising therein. *United States v. Louisville, etc., Canal Company*, 601.

JUDGMENT. See *Mortgage; State Courts*.

1. JUDGMENT LIEN.—EQUITABLE MORTGAGEE.—Respective rights of the equitable mortgagee and the judgment creditor. *First National Bank v. Caldwell*, 316, *note*.
2. ARREST OF, in criminal cases. Revised Statutes, section 1025, construed, 1.
3. JUDGMENT OF STATE COURT.—The judgment of the state court will be considered by the federal courts sitting within the territorial limits of the state in which the same is rendered, as a *domestic judgment*. *Owens v. Gotzian*, 436.
4. VALIDITY.—MODE OF SERVICE.—COLLATERAL ATTACK.—The service of summons by a party to the action is an irregularity that is cured by entry of judgment, and will not avail when the judgment is attacked in a collateral proceeding. *Id.*
5. CUMULATIVE JUDGMENTS in criminal cases. *Peters, Ex parte*, 169.
6. Judgment in *criminal prosecution* as a bar to civil suit for *penalties* for same offence. *United States v. McKee*, 128.

JUDGMENT LIEN. See *Judgment*.JURISDICTION. See *Bankrupt Law; Circuit Court; Guardian's Sales; Habeas Corpus; Indians*.

JURY.

1. Right to jury trial in *bankruptcy appeal*, 168.
2. *Waiver of right*, 168.

KANSAS.

1. *Cases reported from district of*, 349-406.
2. *Interest and usury statute construed*, 358.
3. "Internal Improvement" bonds, 372.
4. Jurisdiction over *military reservation* of Ft. Leavenworth, 380.
5. Jurisdiction over *Indians*, 387.
6. "Cherokee Neutral Lands"—rights of actual settlers, 391.

KANSAS PACIFIC RAILWAY COMPANY.

1. CHARTER OF UNION PACIFIC RAILROAD COMPANY—FIVE PER CENT OF NET INCOME.—Under the act of congress of July 1, 1862 (12 Stats. at Large, 489), construing the charter of the Union Pacific Railroad Company and of the other companies therein named, the United States may recover of the companies receiving its bonds, until such bonds and interest are paid, *five per cent of the net income* earned after the completion of the roads. *United States v. Kansas Pacific Railway Company*, 367.
2. *Same*.—LIABILITY.—FORM OF ACTION.—Such recovery may be had in an action *at law*. *Ib.*

KEOKUK.

- Dedication of streets in, and the uses to which they may be put.
Barney v. Keokuk, 593.

KIDNAPPING. See *Habeas Corpus*.**LACLEDE COUNTY (Missouri).**

- Bonds to aid Laclede, etc., Railroad Company, held valid, 200.

LAND GRANT. See *Burlington and Missouri River Railroad Company; Public Lands; Union Pacific Railroad Company*.

1. Land grant to the Burlington and Missouri Railroad Company, and to the Union Pacific Company, construed; conflict; limits and extent of grant; annulling patent by judicial decree. *United States v. Burlington and Missouri Railroad Company*, 297.
2. Union Pacific Railroad Company; construction of its land grant and that of the Sioux City branch. *Sioux City Railroad v. Union Pacific Railroad*, 307.

LANDLORD AND TENANT.

1. COVENANT TO RENEW LEASE.—RENTAL TO BE FIXED BY THIRD PERSONS.—A lease of certain real property in St. Louis was made for ten years, with a covenant by the lessor for periodical renewals, extending through terms aggregating a period of five hundred

LANDLORD AND TENANT—Continued.

years; the amount of rental at the end of each ten years was to be ascertained by assessors to be appointed by the parties: the lessor fraudulently sought to evade the provisions of the lease in respect to renewals; the lessee, on the faith of the covenant for renewal, had expended in buildings, on the demised premises, \$113,000; the lessor sued the lessee at law for use and occupation, whereupon the lessee filed this bill in equity, to stay the action at law until the lessor appointed an assessor, as required by the lease: *Held*, that a general demurrer to the bill should be disallowed; and the lessee being willing to comply with the lease as to renewal, the court entered an order staying the proceedings at law until the lessor should appoint an impartial assessor to make the valuation, reserving the right to discharge or modify the order as justice might require. *Tscheider v. Biddle*, 55.

2. SPECIFIC EXECUTION of covenant to renew, where rental is to be fixed by third persons, *Ib. note*, 64.

LEVEES.

Levy bonds and special assessments to pay same, 216.

LIEN. See *Execution; Judgment; Mechanic's Lien; Mortgage*.

1. EQUITABLE LIEN.—ELEMENTS.—SETTING APART FUND.—If a debtor, by a concluded agreement with a creditor, sets apart a specific amount of a specific fund in the hands, or to come into the hands, of another, from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation, binding upon the parties, and upon all persons with notice, who subsequently claim an interest in the fund under the debtor. *Ketchum v. Pacific Railroad*, 78.
2. *Same*.—PLEDGE OF EARNINGS.—This principle, applied to a pledge of earnings by the defendant company, to the county of St. Louis, to indemnify it against the issue of its bonds, for the company's benefit, and enforced against mortgagees and purchasers with notice. *Ib.*

LIFE INSURANCE. See *Insurance*.

LIMITATIONS (STATUTES OF).

1. GUARDIAN'S SALES.—Special statute of limitations of Nebraska, in respect of guardian's sales, construed and applied. *Miller v. Sullivan*, 340.
2. BANKRUPT ACT.—Six months limitation in bankrupt act, as to acts of bankruptcy, construed, 345.
3. *Same*.—Two years limitation clause in Bankrupt Act, construed, 165, 386.

LOGS. See *Damages; Public Lands; Replevin*.

LOUISVILLE AND PORTLAND CANAL COMPANY.

1. **LEGISLATIVE HISTORY.**—The legislative history of the Louisville and Portland Canal Company, when first incorporated by Kentucky, in 1825, down to the present, and its relation to the government of the United States, given by Mr. Justice MILLER, who holds that the corporation is still in existence, and has the right to use and control the canal and its revenues, so far as may be necessary for the purposes contemplated by the act of the legislature of Kentucky, and the joint resolution of the two houses of congress of May 24, 1860. *United States v. Louisville and Portland Canal Co.* 601.
2. **RIGHTS OF THE UNITED STATES, OF BONDHOLDERS, AND THE PUBLIC.**—The United States is the only stockholder in the company, and its directors are naked trustees without an interest; and, under the state and federal legislation concerning the canal and the bonds issued to raise money to enlarge and improve it, secured by a mortgage of the revenues and tolls of the canal company, there are three parties interested in the trust and the manner in which its duties shall be discharged by the company: 1st, the bondholders of the company; 2d, the government of the United States, sole stockholder, and which has expended \$1,000,000 upon the canal; and, 3d, the general public. The appropriation act of congress of June 10, 1872, in relation to the canal, construed so as not to impair the rights of the bondholders, and the opinion expressed that congress could not abolish or so limit the tolls as injuriously to affect them, "for the plain reason that it would be a legislative attempt to destroy vested rights, and a taking of private property for public use without due compensation." *Ib.*
3. **INJUNCTION.**—Under the circumstances of the case, the president and directors of the canal company were enjoined, at the suit of the United States, from interfering with its engineer, officers, and contractors in the prosecution of the work of repairing and improving the canal. *Ib.*

MANDAMUS. See *Arkansas; County Warrants.*

1. **AMENDMENT OF WRIT.**—Amendments in form and substance may be allowed in mandamus proceedings, in any stage thereof where justice will be thereby promoted; in this case the alternative writ was amended, by leave of court, by striking out part of its mandate, and the peremptory writ, instead of being denied, because the alternative writ was too broad, was ordered to be issued in conformity to the alternative writ as amended. *United States v. Union Pacific Railroad Company,* 479.
2. **STATE COURTS CANNOT INTERFERE WITH THE PROCESS OF THE FEDERAL COURTS.**—The execution of writs of *mandamus* issued by the circuit court of the United States cannot be interfered with by the process or judgments of the courts of the state, and such interference is illegal and void. *United States v. Silverman,* 224.

MANDAMUS—Continued.

3. *Same.*—**CONTEMPT.**—The relators obtained in this court a judgment against a county, and a peremptory writ of *mandamus* issued commanding the respondent, as county judge, to levy a tax to pay such judgment. He obeyed. Subsequently the state court, in a proceeding to which the relators were not parties, set aside the order for the tax levied by the respondent in obedience to the *mandamus*, and directed the respondent to enter an order on his records annulling the levy of the tax. The respondent obeyed. At the relator's instance a rule issued against the respondent to show cause why he should not be attached for contempt: *Held*, that he was in contempt, and liable to be punished therefor, *Ib.*
4. **THE ORDER** made in the case is given at the end of the opinion, *Ib.*
5. To compel the *Union Pacific Railroad Company* to operate its road as required by law. *United States v. Union Pacific Railroad*, 479.

MARITIME LIENS. See *Admiralty*.

MATERIAL-MEN. See *Admiralty*.

MECHANICS' LIENS.

1. **IOWA STATUTE.**—Under the legislation of Iowa, mechanics and material-men are entitled to a lien on railways for their work and labor. *French v. Burlington, etc., Railway Company*, 570, 579, 580.
2. **DATE OF LIEN.**—Such lien dates from the commencement of the building of the railway, and is prior to a mortgage executed pending the building of the railway, and before the particular work was done or materials furnished for which the lien is claimed, *Ib.*
3. **FILING.**—Within what time mechanics' liens must be filed and enforced, *Ib.*

MESSAGE. See *Telegraph Company*.

MILITARY RESERVATION (FORT LEAVENWORTH).

JURISDICTION OVER FORT LEAVENWORTH RESERVATION.—The title to the land constituting the military reservation of Fort Leavenworth, in Kansas, has always been in the United States; in 1875, at the instance of the secretary of war, the legislature of the state passed an act ceding exclusive jurisdiction to the United States over all territory included within the reservation; congress never expressly assumed this jurisdiction; subsequently a larceny was committed on the reservation: *Held*, that the jurisdiction over the offence was in the courts of the general government, and not in those of the state of Kansas. *Ex parte Hebard*, 380.

MILLS.

Bonds to aid. See *Municipal Bonds*.

MINNESOTA.

1. CASES reported from district of, 407-478.
2. Constitutional provisions authorizing *unnaturalized foreigners to vote* does not make them citizens. *Lanz v. Randall*, 425.
3. "Party to the action," as used in section 47, chapter 66, p. 456, Revised Statutes of Minnesota, extends, it seems, only to parties to the record, 436.

MISDEMEANOR. See *Criminal Law*.

MISSOURI.

1. CASES reported from *Eastern District*, 1-132.
2. CASES reported from *Western District*, 132-208.
3. REVENUE LAWS as to taxation of *national banks*, 29.
4. REVENUE LAWS as to taxation of *railway companies*, 35, 41, 52.
5. "Pledge of earnings" by Pacific Railroad to county of St. Louis, 78.
6. "Registration bond act," 136.
7. "Normal school bonds," 148.
8. "School house bonds," 154.
9. REGISTRY ACT in respect of deeds, etc. 158.
10. LIFE INSURANCE ACT of March 23, 1874, 177.
11. OFFICIAL TERM of officers under savings bank act, 185.
12. LACLEDE COUNTY railroad aid bonds, 200.
13. LIFE INSURANCE ACT in respect of policies by wife on husband's life, 353.

MORTGAGE. See *Mechanics' Liens; Railway Mortgage; Notice; Registry Act*.

1. SUIT AGAINST UNITED STATES.—Whether the United States can compulsorily be made a defendant to a foreclosure bill where it holds a lien or mortgage on the property in respect of which the foreclosure is sought, *quære?* *Meier v. Kansas Pacific Railway*, 378.
2. EXTENSION OF TIME BY PAROL.—In equity, a mortgage or deed of trust is only a lien on the land, and an agreement to extend the time of payment of a debt so secured is not within the statute of frauds, and need not, therefore, be in writing. *Re Betts*, 93.
3. EQUITABLE MORTGAGE by a railroad company constituted by a *pledge of its earnings* under peculiar circumstances. *Ketchum v. Pacific Railroad*, 79.
4. EQUITABLE MORTGAGE.—JUDGMENT LIEN.—The plaintiff corporation, holding as security from its debtor certain railroad coupons, which were convertible into the lands at the option of the holder, and which were so converted, and the deed taken in the name of the debtor, and not recorded, but deposited, in pursuance of an agreement to that effect by the debtor with the plaintiff, as a substituted security in place of the coupons, was held to be an *equitable mort-*

MORTGAGE—Continued.

gagee, and to have an equity in the lands obtained for the coupons, and embraced in the deed, superior to the lien of a general judgment creditor of the common debtor. *First National Bank v. Caldwell*, 314.

5. DEPOSIT OF TITLE DEEDS.—Effect of mere deposit of title deeds in security for a debt as constituting an equitable mortgage,

Ib. note.

6. RECEIVERS.—Appointment of receivers in railway mortgage foreclosure suits, 100.
7. Effect of agreement *not* to record mortgage on the rights of the assignee. *Harris v. Exchange National Bank*, 133.
8. RENTS AND PROFITS AFTER SALE AND BEFORE CONFIRMATION.—WHO ENTITLED TO.—In general, the confirmation of a sale by the court relates back to the time of the sale, and entitles the purchaser to the intermediate rents and profits; but this rule may be changed by statute, and may, *it seems*, yield to countervailing equities arising out of special circumstances. *Lathrop v. Nelson*, 194.
9. *Same*.—Rule in Missouri on this subject, *Ib.*

MUNICIPAL BONDS.

1. MODE OF ENFORCEMENT. See *Arkansas; County Warrants; Mandamus*.
2. REGISTRATION BOND ACT.—FRAUDULENT ANTEDATING.—INNOCENT HOLDER.—A statute of Missouri provided that “*before* any bond hereafter issued by any county shall obtain validity or be negotiated,” it must be first registered by the state auditor, who shall certify thereon that all conditions precedent, required by law, and by the contract under which the bonds were ordered to be issued, have been complied with. Subsequent to the passage of this statute, certain bonds were issued by the county court of Jasper county to a railway company, the said company not having fully complied with the conditions upon which the issue of the bonds had been authorized by a vote of the people. In order to evade the statute, the bonds were antedated to a date prior to the passage of the act: *Held*, that they were void, even in the hands of an innocent holder, and that the county was not estopped to set up this defence. *Anthony v. Jasper county*, 136.
3. NORMAL SCHOOL BONDS IN MISSOURI.—Missouri normal school act constitutional, and bonds issued thereunder valid. *Briggs v. Johnson County*, 148.
4. MISSOURI SCHOOL HOUSE BONDS: REMEDY CUMULATIVE.—Bonds issued under the act of the legislature of Missouri of March 21, 1870, for building school houses, and reciting that act as the authority for their issue, are *prima facie* valid; and the holder may sue thereon, and is not confined to the special remedy prescribed in the act. *Bonham v. Board of Education of Harrisonville*, 156.

MUNICIPAL BONDS — Continued.

5. **RECITAL. — PRELIMINARY CONDITION. — VALID THOUGH ISSUED TO A CORPORATION DE FACTO.**—Bonds issued by the defendant county in 1870, under the act of January 11, 1860, to the LaCledé and Fort Scott Railroad Company, are valid in the hands of an innocent holder, although not sanctioned by a popular vote, and although the said railroad company—the payee—was not at the time a corporation *de jure*. *Darlington v. LaCledé County*, 200.
6. **INTERNAL IMPROVEMENT BONDS. — BONDS TO AID ERECTION OF WATER-MILL.**—Negotiable bonds made by the defendant township, under legislative authority, reciting that they are issued “for the purpose of aiding internal improvements in said township,” are valid in the hands of a holder for value, although they may have been in fact issued to aid in the improvement of a water-power, and the erection of a water-mill owned by private persons. *Guernsey v. Burlington Township*, 372.

MUNICIPAL CORPORATION. See *County Warrants*; *Keokuk*; *Municipal Bonds*; *Streets*; *Wharfage Tax*.

1. Dedication of streets; municipal control; railway tracks and depot building in street; steamboat depot building on Water street. *Barney v. Keokuk*, 593.
2. Power to impose *wharfage taxes*, 10.

NATIONAL BANKING ASSOCIATIONS. See *Banks*.

1. **TAXATION of shares in national banks; construction of Revised Statutes, section 5219,** 29.
2. ***Same*. — AUTHORITY OF THE STATES.**—By the section of the national banking act (Rev. Stats. sec. 5219), which permits the states to authorize all the shares held in national banks, by any person, to be included in the valuation of his personal property, and to be assessed at the place where the national bank is located, subject to the restriction “that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals,” congress has limited the states to taxation upon the shares in national banks, as distinguished from taxation of the banks *eo nomine* upon their property or capital. A state cannot evade the restrictions of the act by requiring the value of the property of the bank to be added to the value of the shares otherwise ascertained, and thus produce an unfavorable discrimination in the taxation of bank shares. *St. Louis National Bank v. Papin*, 29.
3. **WINDING UP. — ASSESSMENT BY COMPTROLLER.**—In winding up an insolvent national bank the comptroller of the currency is vested with authority to determine when a deficiency of assets exists, so that the individual liability of the stockholders may be enforced, and no appeal lies from his decision. *Bailey v. Sawyer*, 463.
4. **LIABILITY OF STOCKHOLDER. — REMEDY.**—The liability of a stock-

NATIONAL BANKING ASSOCIATIONS—Continued.

holder of a national bank is several. When a specific assessment upon the stockholders is ordered by the comptroller, a suit at law is a proper remedy to enforce it. *Ib.*

5. USURY.—STATUTE OF KANSAS.—A national bank, located in Kansas, charged and received interest at the rate of eighteen per cent per annum: *Held*, that it was liable, under the national banking act (Rev. Stats. secs. 5197, 5198), to pay back twice the amount of interest thus received. *Crocker v. National Bank of Chetopa*, 358.
6. *Same*.—RIGHT OF ACTION.—ASSIGNEE IN BANKRUPTCY.—If the person who paid such illegal interest is adjudged a bankrupt, the right of action passes to his assignee in bankruptcy, such assignee being his "legal representative," within the meaning of section 5198 of the Revised Statutes. *Ib.*
7. *Same*.—EXTENT OF LIABILITY.—The amount of the recovery is twice the full amount of interest paid, and is not limited to twice the excess of interest paid over the legal rate. *Ib.*

NATURALIZATION OF ALIENS.

1. POWER OF THE STATES.—A state cannot make a subject of a foreign government a citizen of the United States. This can only be done in the mode provided by the naturalization laws of congress. *Lanz v. Randall*, 425.
2. Removal of causes by resident foreigners. See *Removal of Causes*.

NAVIGABLE WATERS. See *Injunction; Streets*.

NEBRASKA.

1. CASES REPORTED from district of Nebraska, 297-347.
2. JUDGMENT LIENS in 314.
3. Legislation as respects GUARDIANS' SALES construed, 340.

NEGLIGENCE.

BANK.—Negligent omission of duty of bank as a collecting agent, 290.

NEW TRIAL. See *Jury*.

NORMAL SCHOOLS.

1. ACT CONSTITUTIONAL.—The Missouri constitution of 1865, art. IX., sec. 2, provides that, "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free schools for the gratuitous instruction of all persons in the state between the ages of five and twenty-one years." Section 4 is as follows: "The general assembly shall also establish and maintain a state university, with departments for instruction in teaching, in agriculture, and in natural science, as soon as the public school

NORMAL SCHOOLS—Continued.

fund will permit:” *Held*, that the fact that the free schools and a state university are expressly mentioned in the constitution, and normal schools are not, does not amount to a constitutional prohibition against their establishment. *Briggs v. Johnson County*,

148.

2. **TAXATION.**—Legislature may aid such schools by taxation, *Ib.*

3. **BONDS** issued for such purpose held valid, *Ib.*

NOTICE.

Mortgagees held bound to take notice of statutory lien. *Ketchum v. Pacific Railroad*,

79.

OCCUPYING CLAIMANTS.

1. **DES MOINES RIVER LANDS.—SETTLERS’ RIGHTS.**—Settlers on what are known as the Des Moines river lands, in Iowa, may be entitled to the benefits given by the statute to occupying claimants when they have made valuable improvements on lands of which they are afterwards adjudged not to be the rightful owners. *Litchfield v. Johnson*,

551.

2. **“COLOR OF TITLE.”—“GOOD FAITH.”**—The “occupying claimants” statute of Iowa, as to “color of title” and “good faith,” construed, *Ib.*

3. Right to remove from state to federal court the petition of the occupying claimant. *Chapman v. Barger*,

557.

OFFICER.

DURATION OF TERM.—Liability of *surety of cashier* whose term of office was *annual*, was held not to extend to defaults happening after a new election. *Harris v. Babbitt*,

185.

ORES.

Liability of tenant in common to co-tenant,

469, *note*.

PACIFIC RAILROAD OF MISSOURI.

1. **TAXATION** of its property by the state,

35, 41.

2. By the United States,

66, 71.

3. **EQUITABLE MORTGAGE** to St. Louis county to secure \$700,000 bonds under act of January 7, 1865,

78, 87.

PARDON.

The unconditional pardon by the president, of the offence charged in an indictment, is a bar to a civil suit for penalties for the same offence. *United States v. McKee*,

128.

PATENTS FOR INVENTIONS.

1. **PRELIMINARY INJUNCTIONS.**—Principles which guide courts in granting or refusing preliminary injunctions in patent cases stated by *MILLER, J.*,

448.

PATENTS FOR INVENTIONS—Continued.

2. **INJUNCTION PENDENTE LITE.—WHAT ESSENTIAL.—DECREE OF SUPREME COURT.—EFFECT OF.**—Application for an injunction, *pendente lite*, to restrain defendants from an alleged infringement of the Cochrane patent (owned by the plaintiff) for the “new process” of manufacturing flour from “middlings;” the patent having been sustained by a decree of the supreme court, and that decree not having been shown to be collusive, the validity of the patent was considered as sufficiently established to give the right to an injunction; but the injunction was refused because the infringement was not satisfactorily shown. *Am. Middlings Purifier Co. v. Milling Co.* 100.
3. *Same.*—**KEEPING AN ACCOUNT.**—Although an injunction was denied, the defendants were required to keep an account of flour manufactured in their mills, and report the same monthly, under oath, and to submit to an examination of their mills, when in operation, by the plaintiff, its counsel, and expert witnesses, *Ib.*
4. *Same.*—In another case by the same plaintiff against other defendants, the infringement being made probable, the court ordered an injunction unless the defendants would give a bond conditioned for the payment of any final decree for money in favor of the plaintiff, and for keeping an accurate account of the amount of flour made by them, and to report the same every three months to the court. *Am. Middlings Purifier Co. v. Christian,* 448.
5. **INJUNCTION DENIED.**—A preliminary injunction in a patent case was denied where the suit in which it was asked had been pending for many months, and was nearly ready for final hearing, and no ground for the writ was shown which was not known to the complainants at the time the suit was instituted. *Andrews v. Spear,* 472.
6. **EFFECT OF DECREE IN SUPREME COURT IN FAVOR OF PATENT.**—The alleged invalidity of the reissued Cochrane patent on the ground that it contains claims not warranted by the original patents, and on the ground that the invention was not novel, was not shown with such clearness as to justify the court in holding, on a preliminary application, a patent to be void, which has been sustained by the supreme court. *American Middlings Purifier Co. v. Milling Co.* 100.
Same v. Christian, 448.
7. *Same.*—**DECREE IN CIRCUIT COURT.**—A decree or judgment of a circuit court, after full hearing or trial in an adversary cause, sustaining a patent, is very strong evidence of its validity in an application for an injunction; and such a decree or judgment of the supreme court is of still greater weight, if not absolutely conclusive. *Am. Middlings Purifier Co. v. Milling Co.* 100.
Same v. Christian, 448.
8. **BONDS.—INJUNCTION.**—The giving of a bond by a defendant as a

PATENTS FOR INVENTIONS—Continued.

- condition of avoiding an injunction, will not be required, except in a case where, if the bond is not given, an injunction will and ought to issue. *Am. Middlings Purifier Co. v. Milling Co.* 100.
Same v. Christian, 448.
9. **PREVIOUS USER.**—Previous user of the patent by the plaintiff, or those who claim under him, is not absolutely essential to the right to an injunction; if the validity of the patent has been established by a decree or judgment of the circuit or supreme court, the plaintiff, if otherwise entitled, may have an injunction without showing previous general user, especially where the patent is for a *process*, as distinguished from a *machine*. *Am. Middlings Purifier Company v. Christian,* 448.
10. **PLAINTIFF'S LACHES.**—Effect of plaintiff's *laches* on his right to an injunction considered; and, under the circumstances, held not to defeat the right, *Ib.*
11. **EXPERT TESTIMONY** in patent causes, and the weight to be attached to *ex parte* affidavits, commented on by MILLER, J. *Ib.*
12. **DRIVE-WELLS.—COMBINATION.—CRAIG'S PATENT.**—The drive well-tube patent, issued June 11th, 1867, to the plaintiff, is for a *combination*, of which the air chamber is part; and the enlarged *drill-head*, and the application of the wire screen on the *outside* of the tube, held not to be novel; and as the tubes made by the defendant do not contain the air chamber (an essential part of the plaintiff's patented combination), there is no infringement of the plaintiff's patent. *Craig v. Smith,* 349.

PATENTS FOR LAND.

- Annulling of by judicial decree at suit of the United States. *United States v. Burlington and Missouri Railroad Company,* 297.

PENALTIES. See *Former Recovery*.

PLEADING AND PRACTICE. See *various heads*.

Amendment in mandamus proceedings. See *Mandamus*.

POLICY OF INSURANCE. See *Insurance*.

PRINCIPAL AND AGENT. See *Banks*.

PRINCIPAL AND SURETY.

1. Liability of surety as to time, when his principal's term of office is *annual*. *Harris v. Babbitt,* 185.
2. **SUBROGATION.**—The complainant, as collector of internal revenue, held not entitled, by way of subrogation, to the rights of the United States as a preferred creditor. *Wilkinson v. Babbitt,* 207.

PROMISSORY NOTE. See *Bills and Notes*.

PROTEST.

- Effect of payment of illegal taxes under protest, 10.

PUBLIC LANDS. See *Burlington, etc., Company; Damages; Railroads; Union Pacific Company.*

1. Cutting timber upon public lands; evidence; remedy of government; indictment; replevin; trover; measure of damages. *Bly v. United States*, 464.
2. "CHEROKEE NEUTRAL LANDS."—CONSTRUCTION OF TREATY.—Rights of "actual settlers" upon the Cherokee neutral lands purchased by the defendant Joy (see *Holden v. Joy*, 17 Wall. 211), under the 17th article of the treaty of July 19, 1866, as amended, considered; and it was held that an actual settler, whose rights were perfect at the date of the ratification of the treaty, could sell his improvements and rights to another, and that the bill made a case showing in the plaintiff an equitable title to the land in question. *Langdon v. Joy*, 391.
Stroud v. Missouri River, etc., Railroad Company, 396.
3. *Same.*—Grantee may make proof and make the purchase, *Ib.*
4. *Same.*—The land is not "mineral land" within the meaning of the treaty, because a coal deposit underlies it. *Stroud v. Missouri, etc., Railroad Company*, 396.
5. *Same.*—Whether the treaty, as finally amended, provides for one or two classes of settlers, discussed, but not decided, *Ib.*
6. Proof by the United States of title to its public lands. See *Evidence.*

QUIETING TITLE.

- Jurisdiction, when at law and when in equity, of suit to quiet title, under the Iowa statute. *Balmear v. Otis*, 558.

RAILROAD. See *Burlington and Missouri Railroad Company; Hannibal and St. Joseph Railroad Company; Kansas Pacific Railroad Company; Mechanics' Lien; Pacific Railroad of Missouri; Railway Mortgage; Receivers; Rents and Profits; Sioux City and Pacific Railroad Company; Union Pacific Railroad Company.*

1. TAXATION of property of railroad companies, 35, 41, 52, 66.
2. EQUITABLE MORTGAGE of charge by pledge of earnings, 79.
3. Right, with assent of municipality, to lay down track in streets in Iowa. *Barney v. Keokuk*, 593.
4. No right to build railway depot building in the streets, *Ib.*
5. Otherwise as to steamboat depot building on Water street, to accommodate boats navigating the Mississippi river. *Ib.*
6. RELIEF against fraudulent contract made by the officers of a railway corporation in their own interest. *Wardell v. Union Pacific Railroad Company*, 830.
7. When receivers will and will not be appointed. (See *Receivers.*)

RAILROAD—Continued.

8. **EXCLUSION OF GAMBLERS FROM CARS.**—Gamblers and monte-men, whose purpose in traveling upon a train is to ply their vocation, may be excluded. *Thurston v. Union Pacific Railroad Company*, 321.

RAILWAY MORTGAGE.

1. **MECHANIC'S LIEN.**—Under the legislation of Iowa, the relative rights and priorities of mechanics and mortgagees considered and determined. *French v. Burlington, etc. Railway Co.* 570.
Union Rolling Mill Co. v. Burlington, etc. Railway Co. 579.
U. S. Wind Engine Co. v. Burlington, etc. Railway Co. 580.
2. **PURCHASE BY TRUSTEE.**—Construction of special provisions of deed of trust and decree, as to reorganization of a new railroad company, where the trustee purchased the property of the former company under a foreclosure decree for the benefit of the bondholders. *Farmers' Loan and Trust Company v. Central Railroad*, 546.
3. **CONFIRMATION OF SALE.—APPEAL.—SUPERSEDEAS.**—Appeal from the order confirming sale granted, but supersedeas denied, under the facts of the particular case. [The order denying supersedeas held erroneous by the supreme court. See *note*, p. 548,] *Ib.*
4. **EXECUTION OF RAILWAY FORECLOSURE DECREE PENDING AN APPEAL.—INDIVIDUAL BONDHOLDERS.—TRUSTEE'S DISCRETION.**—This court heretofore rendered a decree of foreclosure of a railway mortgage in favor of the plaintiff, as the trustee for all the bondholders; certain bondholders, dissatisfied with the decree, appealed to the supreme court (3 Otto, 412). The supreme court refused to dismiss the appeal, which is still pending in that court, but vacated the supersedeas; certain bondholders, in March, 1877, applied for an order to compel the trustee to sell, under the decree, pending the appeal, against its judgment of what was best for all the bondholders, and the court refused to interfere with the discretion of the trustee. The same bondholders then applied to the supreme court for a *mandamus* to compel the circuit court to order the trustee to sell, pending the appeal, which the supreme court (March 27, 1877) refused. The same bondholders now (May term, 1877) renew their application for an order to the trustee to cause the special master to execute the decree, notwithstanding the pending appeal and the protest of other bondholders: *Held*, that individual bondholders, not parties to the decree, had no *legal* right to have the decree executed, pending the appeal, against the judgment of the trustee as to what was for the best interests of all the bondholders; but that the trustee was at liberty to execute the decree or not, pending the appeal, as in its judgment was best for all the *cestuis que trust*. *Farmers' Loan and Trust Company v. Central Railroad*, 531.
5. Removal of foreclosure suits from state to federal courts. See *Removal of Causes*.

RECEIVER.

1. ACTIONS AGAINST.—CONTEMPT.—A person who brings an action in one court against a receiver appointed by another court, without the consent of the court that appointed the receiver, is guilty of a contempt of the latter court; and this is so although such action may not result in disturbing the possession of the receiver. *Thompson v. Scott*, 506.
2. Proper practice stated where a receiver has been appointed. *Ib.*
3. RAILROAD RECEIVERS.—WHEN APPOINTED.—A court of equity will not appoint a receiver of a railroad merely upon a showing that there has been a default in the payment of interest, secured by a mortgage of the properties and income of the company, that upon such default the trustees under the mortgage were entitled to immediate possession, that they have demanded possession, and that the same has been refused. It is necessary, in addition to this, to show that ultimate loss will happen to the beneficiaries under the mortgage by permitting the property to remain in the hands of its owners until final decree and sale, if such decree and sale be made. *Union Trust Company v. Railroad Company*, 114.
4. PRINCIPLE APPLIED.—The facts in this case examined, and held not to exhibit such danger to the bondholders as to warrant the appointment of a receiver. The case of *Williamson v. New Albany Railroad Company*, 1 Bissell, 198, followed. *Ib.*

RECORDING ACT. See *Notice*; *Registry Act*.

REGISTRY ACT. See *Mortgage*; *Notice*.

1. Effect of agreement not to record mortgage. *Harris v. Ex. National Bank*, 133.
2. CONDITIONAL SALES OF CHATTELS IN MISSOURI.—Instruments evidencing a conditional sale of chattels need not be recorded in Missouri in order to be valid against creditors or subsequent purchasers—the registry law of Missouri only extending to mortgages or deeds of trust of chattels. The instrument in judgment held to be a sale on condition, and not a mortgage within the registry laws of Missouri. *Rogers Locomotive Works v. Lewis*, 158.

REMISSION OF INDICTMENTS.

From district to circuit court of the United States. *United States v. McKee*, 1.

REMOVAL OF CAUSES.

1. ALIENS.—WHO ARE.—Unnaturalized resident foreigner, though a voter by authority of a state, may remove a cause from the state to the federal court, on the ground of alienage. *Lanz v. Randall*, 425.
2. PETITION.—VERIFICATION.—The petition, under the act of 1875, is not required to be sworn to. *Connor v. Scott*, 242.

REMOVAL OF CAUSES—Continued.

3. NO ORDER OF REMOVAL NECESSARY.—The mere filing of the petition and bond removes the cause *ipso facto*, if the cause is removable, and the petition and bond are filed in due time, and are in due form. *Connor v. Scott*, 242.
4. A MERE DEPENDENCE upon an original suit cannot be removed; and such, under the statute of Iowa, is the petition in an ejectment suit, after judgment, of an occupying claimant for compensation for improvements. *Chapman v. Barger*, 557.

I. ACT OF MARCH 3, 1875.

5. SUBJECT MATTER.—LAW OF UNITED STATES.—To a bill filed in a state court to enforce a vendor's lien, the defendant set up a sale of the land in question to him, by the assignee in bankruptcy of one C, the maker of the notes constituting the lien, and filed his petition for the removal of the cause to the United States court: *Held*, that this involves the construction of the bankrupt law, and is therefore properly removable; and it does not alter the case that there are other questions of law to be settled, which depend on general principles, and not on the laws of congress. *Connor v. Scott*, 242.
6. DOES NOT APPLY TO TERRITORIAL COURTS.—The act of March 3, 1875, which provides that any suit "now pending, or hereafter brought in any state court," of the description therein specified, may be removed into a federal court, is not applicable to a suit brought in a territorial court, although, on the admission of the territory as a state, such suit passed into the jurisdiction of a state court. *Ames v. Col. Cent. R. R. Co.* 260.
7. CITIZENSHIP.—"CONTROVERSY."—"SUIT."—PARTIES.—The plaintiff, a citizen of Colorado, brought a stockholder's bill in a state court, in Colorado, making as defendants thereto the railroad company (also a citizen of Colorado), in which the plaintiff was a stockholder, viz.: the Denver Pacific Railway Company, and also the directors thereof, including two directors, citizens of Colorado, against whom, however, no charges were made, and no relief asked; also, making a defendant another railroad company, viz.: the Kansas Pacific Railway Company (a citizen of Kansas), and certain individuals, all citizens of other states than Colorado. The object of the bill was to secure an accounting in favor of the Denver Pacific Company against the Kansas Pacific Company, and to secure a decree *in personam* against the non-resident directors of the Denver Pacific Company. The Kansas Pacific Company, and the individual defendants connected with that company, without being joined with the other defendants, applied to remove the suit to the circuit court of the United States, under the act of March 3, 1875: *Held*, that the suit was removable. *Arapahoe County v. Kansas Pacific Railway Company*, 277.

REMOVAL OF CAUSES—Continued.

8. *Same*.—In a stockholder's bill of the kind before the court, the company in which the plaintiffs are stockholders is a necessary party defendant, but the interests of the stockholders and the company are identical, and they represent one side of the controversy, and the company against whom the accounting and relief are sought represents the other, *Ib.*
9. DECEDENT'S ESTATE.—"CONTROVERSY."—A contest in regard to the distribution of the estate of a deceased person, where the amount involved is sufficient and the citizenship of parties is such as would confer jurisdiction, is a "controversy" that may be removed from the state to the federal courts under the provisions of act of congress of March 3, 1875. *Craigie v. McArthur*, 474.
10. IMPROPER JOINDER OF DEFENDANTS.—The right of removal cannot be defeated by the joinder as defendants of citizens of the same state with the plaintiff, if no relief is prayed against them, and they are made defendants without any right or reason or just cause. *Arapahoe County v. Kansas Pacific Railway Company*, 277.
11. WHOLE SUIT REMOVED.—The removal act of March 3, 1875, provides that the suit—the whole suit, and not a part of the suit—shall be removed; and under that act, if the requisite conditions exist, any one of the plaintiffs or defendants may remove the suit and carry the other parties with them. *Arapahoe County v. Kansas Pacific Railway Company*, 277.
12. TIME.—Under act of March 3, 1875, application to remove a cause must be made to the state court at or before the term in which, according to the local law and practice of the court, the cause could have been finally heard. Accordingly, where issue was joined nearly one month before the end of a term of the state court, and it does not appear but that a final hearing could have been had at that term, an application thereafter made to remove the cause, under the act of 1875, will be denied. (See, on this point, *Scott v. Clinton and Springfield Railroad*, 6 Bissell, 529.) *Ames v. Colorado Central Railroad Company*, 260.
13. WHEN REMOVAL MUST BE ASKED.—Such removal must be before trial in the court of *original jurisdiction*, and cannot be made from a court to which, after hearing, an appeal has been taken. *Craigie v. McArthur*, 474.
14. TIME.—IOWA STATUTE.—LAW ACTIONS.—The act of congress of March 3, 1875 (section 3), requires the petition for the removal of causes from the state court to the circuit court to be made "before or at the term at which the cause could be first tried, and before the trial thereof." The Code of Iowa provides that law actions "shall be tried at the first term after legal and timely service has been made:" *Held*, that this provision limits the time in Iowa at which the application for the removal of law actions, under the act of March 3, 1875, can be made. *Atlee v. Potter*, 559.

REMOVAL OF CAUSES—Continued.

15. *Same.*—Accordingly, an application in Iowa, by the defendants, for the removal of a law action which was not made at the return term, nor at the next term, when the defendants entered their appearance, nor yet at the next succeeding term, is not in time, under the act of March 3, 1875, although it was made at the term at which the answer was filed and the issues of fact completed, *Ib.*
16. *Same.*—**APPEARANCE.—CONTINUANCE.**—An action at law in the state court was commenced by attachment, but no process was issued or served. At the next term the defendant, by consent, entered an appearance, and, by consent, also, the cause was continued and leave given to the defendant until the second day of the next term, to answer; all of which was contained in the same journal entry. The Code of Iowa provides that such actions “shall be tried at the first term after legal and timely service.” At the term to which the cause was thus continued, a petition, under the act of March 3, 1875, for the removal of the cause to the circuit court of the United States was filed: *Held*, under the circumstances, that the application for the removal was in time. *McCullough v. Sterling Furniture Company*, 563.
17. *Same.*—If the entry of an appearance by the defendant had been general and unconditional, and at a term prior to the order for continuance, a different question would have been presented. *Ib.*
18. *Same.*—**TRIAL TERM.—LIMIT OF TIME.**—In view of the specific provisions of the Code of Iowa, definitely fixing the time for the trial of *law actions*, the time for the removal, under the act of March 3, 1875, cannot be extended by the circumstance that in point of fact the issues are not made up at the first term. It might be different in the absence of statutory regulation as to what shall be the trial term. *Atlee v. Potter*, 559.
19. **TIME.—IOWA STATUTE.—EQUITY SUITS.**—Under the Code of Iowa, equity suits are not triable at the appearance term, and such suits may, under the act of March 3, 1875 (sec. 3), be removed to the circuit court of the United States at the second term. *Palmer v. Call*, 566.
20. *Same.*—**MORTGAGE FORECLOSURE SUITS.**—Under that Code, the same rule as to the time of removal applies to suits to foreclose mortgages, at least when there is no rule of court requiring such suits to be tried at the appearance term.
21. **PENDING SUITS.—TIME.—INFORMAL BOND.**—Removal of suit under act of March 3, 1875; time in which application must be made to remove suits pending when that act took effect; informal bond held sufficient. *Baker v. Ryerson*, 562, *note*.

II. REVISED STATUTES, SECTION 639.

22. LOCAL PREJUDICE AND INFLUENCE ACT.—REVISED STATUTES, SECTION 639, SUB-DIVISION 3.—ACT OF MARCH 3, 1875.—A foreclosure suit by trustees in a railway mortgage, who are citizens of *Massachusetts*, was commenced in one of the state courts in Iowa against the debtor company, which is an *Iowa* corporation, making an *Illinois* and an *Indiana* corporation, each of which claimed liens upon the property, also defendants to the bill. This suit, after all of the defendants had answered, was removed, in 1876, to the circuit court of the United States for the district of Iowa, upon petition of the *plaintiffs*, under the act of 1867 (Rev. Stats. sec. 639, sub-division 3); the debtor corporation moved to remand the same to the state court, because *all* of the defendants were not citizens of the state in which the suit was brought: *Held*, inasmuch as the case was one clearly within section 2 of the act of March 3, 1875, in respect of removals, and the controversy one in relation to the priority of liens between citizens of different states, that the circuit court had jurisdiction, and that it should not be remanded. *Burnham v. Chicago, etc. Railroad Company*, 503.

RENTS AND PROFITS.

- Who entitled to rents and profits for the period intervening between the sale and the confirmation of the sale of mortgaged premises.
Lathrop v. Nelson, 194, 198.

REPLEVIN.

1. Right to replevy logs cut on the public lands. *Bly v. United States*, 464.
2. Measure of damages, *Ib.*

RES JUDICATA. See *Former Recovery*.

REVENUE LAWS. See *Injunction*; *Internal Revenue*; *Taxes*.

SALES.

1. CONDITIONAL sales of personal property are valid in Missouri. *Rogers Locomotive Works v. Lewis*, 156.
2. Registration of, *Ib.*

SCHOOLS. See *Normal School*.

1. School house bonds issued under Missouri act of March 21, 1870 held valid, 156.
2. The specified remedy held accumulative, 156.

SET OFF.

- NOT PLEADABLE in a suit by the United States to enforce payment of taxes. *United States v. Pacific Railroad*, 66.

SIOUX CITY AND PACIFIC RAILROAD COMPANY.

- Construction of land grant by congress to this company. *Sioux City Railroad v. Union Pacific Railroad*, 307.

SPECIFIC PERFORMANCE.

1. COVENANT TO RENEW in lease. Specific execution of such a covenant where the rental is to be fixed by third persons. *Tscheider v. Biddle*, 55.
2. As to the specific execution of *agreements to refer or to arbitrate*, *Ib. note*.

STATE. Effect of admission of a state into the Union on the courts of the territory; see *Colorado; Territory*.

STATE COURTS. See *Indians; Judgment; Mandamus; Naturalization; Removal of Causes*.

1. Injunction to stay proceedings in a court of a state. *Chaffin v. St. Louis*, 19.
2. Judgments of, conclusive in federal courts, between parties and privies, to same extent as in the courts of the state. *Chaffin v. St. Louis*, 24.
3. Suits pending in, when pleadable in abatement. See *Abatement*.
4. Power of federal court to release on *habeas corpus* persons in custody under state authority. *In re Bull*, 323.
5. No jurisdiction in the state courts over military reservation of Ft. Leavenworth. *Ex parte Hebard* 380.

STATUTES. See *Various Heads*; list of acts of congress, and of sections of the Revised Statutes construed, *ante*, 7.

STATUTE OF FRAUDS. See *Mortgage*.

STATUTORY LIEN.

Act of Missouri of January 7, 1865, held to create, when accepted and acted on, a statutory lien, in favor of St. Louis county against the earnings and property of the Pacific Railroad Company, 79.

ST. LOUIS COUNTY.

Statutory mortgage to, by the Pacific Railroad, 79.

STEAMBOAT. See *Admiralty*.

Depot building on Water street, Keokuk, erected under municipal authority to accommodate navigation, held to be an authorized structure. *Barney v. Keokuk*, 593.

STREETS.

1. EJECTMENT.—Right to maintain ejectment subject to the public easement, *quare?* *Barney v. Keokuk*, 593.

STREETS—Continued.

2. **KEOKUK.—FEE IN STREETS.**—The owner of lots in the city of Keokuk, fronting on Water street, owns the fee in the street to the river, subject to the public easement. *Ib.*
3. **WATER STREET.—LAND RECLAIMED FROM RIVER.**—The same rule applies to the original street and the newly made portions thereof reclaimed from the river. *Ib.*
4. **USES.—RAILWAYS.**—Under the legislation of Iowa, as construed by the supreme court of the state (which construction was followed by this court), a railway company, with the assent of the municipal authorities, has the right to lay down its tracks over and upon Water street, in front of the plaintiff's lots, without the plaintiff's consent; but this right does not extend to the erection in the street of a permanent and substantial railway depot building in front of the plaintiff's lots, to the plaintiff's injury. *Ib.*
5. **Same.—STEAMBOAT DEPOT BUILDING.**—In view of the location and purpose of the dedication of Water street and the charter power of the city, it was held that the city might authorize a steamboat company to erect, for the shipment and receipt of merchandise, a building on or near the bank of the river in front of the plaintiff's lot, reserving municipal and police control over such structure. *Ib.*

SUBROGATION. See *Principal and Surety*.

SUPERSEDEAS. See *Appeal*.

SURETY. See *Banks; Principal and Surety*.

SURRENDER OF FUGITIVES FROM JUSTICE. See *Extradition; Habeas Corpus*.

SWAMP LAND GRANT. See *Evidence*.

STOCKHOLDER. See *Corporation; Louisville and Portland Canal Company; National Banking Associations*.

Liability of stockholders in national banks; assessment by the comptroller; remedy. *Bailey v. Sawyer*, 463.

TAXES AND TAXATION. See *Injunction; Internal Revenue; Levees; Mandamus; National Banking Associations; Wharfage Tax*.

1. **MAY BE ENFORCED BY SUIT.**—The obligation or duty to pay taxes assessed by the United States is one which may be enforced by suit, by an action at law, or a bill in equity, according to the nature of the relief sought. *United States v. Pacific Railroad*, 66.
2. **SET-OFF NOT PLEADABLE.**—In such a suit by the United States, the defendant cannot plead a set-off, legal or equitable, growing out of independent claims against the United States, although such claims are just, and have been presented to and rejected by the proper auditing officers. *Ib.*

TAXES AND TAXATION—Continued.

3. REMEDY AGAINST ILLEGAL TAX.—The remedy against an illegal tax assessed by the *United States*, pointed out. *Ib.*
4. REMEDY against illegal taxes levied under *state* authority. See *Injunction*.
5. LEVEE taxes and bonds in Arkansas. *Boro v. Phillips Co.* 216.
6. Taxes levied in obedience to writ of mandamus. See *Mandamus*.
7. PAID UNDER PROTEST.—Whether illegal taxes, when paid under protest, may be recovered back, 10.
8. SHARES.—NATIONAL BANKS.—REVENUE ACT OF 1872 OF MISSOURI.—Shares in *national banks* taxable by the states; Revised Statutes, section 5219, construed, and held not to be infringed by the revenue act of Missouri of 1872. *St. Louis National Bank v. Papin*, 29.
9. POWERS OF BOARD OF EQUALIZATION.—A statute of Missouri provided that the state board of equalization "shall proceed to adjust and equalize the aggregate valuation of the property of each one of the railroad companies liable to taxation under the provisions of this act:" *Held*, that this only authorized the board to equalize the aggregate valuations of the county boards, and did not give them power to act as an original assessing body, and make an assessment *de novo*. *Paul v. Pacific Railroad Company*, 35.
10. *Same*.—ACTS ULTRA VIRES.—Although to make an assessment *de novo* would be an act beyond the power of the board, and void, this would not vitiate the entire tax, but would leave the final valuation as fixed by the county boards, *Ib.*
11. *Same*.—INJUNCTION.—The companies were required to pay taxes on the valuation fixed by the county boards, and the collecting officers were enjoined only in respect to the excess over such valuation, *Ib.*
12. *Same*.—OVER-VALUATION.—A mere error of judgment on the part of the assessing officers, as to the valuation of property, is not, in the absence of fraud, subject to judicial revision. The charge of fraud made against the state board of equalization not sustained by the proofs, *Ib.*
13. *Same*.—NEW CONSTITUTION OF MISSOURI.—Powers of board of equalization under section 18, article 10, of the constitution of Missouri of 1875. *Ketchum v. Pacific Railroad*, 41.
14. POWER OF COURT over wrong assessment; mistake of fact, *Ib.*
15. PENALTIES AND ATTORNEYS' FEES under revenue act of Missouri, *Ib.*
16. RETROSPECTIVE TAXES—when enforceable. *Moore v. Holliday*, 52.
17. NORMAL SCHOOL ACT OF MISSOURI.—Normal schools being public institutions, the legislature possesses the right to grant the power of taxation in aid of their establishment. *Briggs v. Johnson County*, 148.

TAXES AND TAXATION—Continued.

18. INDIAN LANDS.—Lands patented to the Indian reservees, under the treaty with the Miami Indians, June 5th, 1854 (10 Stats. at Large, 1092), are liable to be taxed by the state authority after the title has passed from the Indian reservee to a citizen. *Peck v. Miami County*, 370.
19. UNION PACIFIC RAILROAD COMPANY.—BRIDGE.—Bridge of the Union Pacific Railroad Company over the Missouri river, subject to valuation and taxation by state authority as a bridge. *Union Pacific Railroad Company v. Pottawattamie County*, 497.

TELEGRAPH.

- Contracts by telegraph, 431.

TENANT. See *Landlord and Tenant*.TENANT IN COMMON. See *Damages; Union Pacific R. R. Co.*TERRITORY. See *Colorado*.

TERRITORIAL COURTS.—ADMISSION OF STATE.—Admission of Colorado as a state and its effect upon the territorial courts, and upon causes pending therein at the time of such admission; construction of enabling act (18 Stats. at Large, 474) and the act of congress of June 26th, 1876, creating federal courts in Colorado, 251, 260, 264, 265.

TERRITORIAL COURT. See *Colorado*.TREATY. See *Belgium; Extradition; Indians; Public Lands*.TREES. See *Damages; Timber*.

TROVER.

- By the United States for timber cut on the public lands; measure of damages. *Bly v. United States*, 464.

TIMBER.

- Cutting timber on the public lands of the United States; remedies; measure of damages, *Bly v. United States*, 464.

TONNAGE DUTY. See *Wharfage Tax*.

TRESPASS.

- Upon the public lands; remedy of the United States. *Bly v. United States*, 464.

TRUST FUNDS. See *Bankrupt Law*.

UNION PACIFIC RAILROAD COMPANY.

1. LIABILITY TO UNITED STATES.—NET EARNINGS.—Right of the government to recover five per cent of the net earnings of the company. *United States v. Kansas Pacific Railway Company*, 367.

UNION PACIFIC RAILROAD—Continued.

2. CONSTRUCTION OF LAND GRANT.—Where the land grant of congress to the Union Pacific Railroad Company and the Sioux City branch (12 Stats. at Large, 489; 13 *ib.* 356), conflict, and the limits of the respective grants overlap each other, and lands in the common territory were patented to the two companies jointly, as tenants in common: *Held*, upon a construction of the legislation of congress in this regard, that the patent was rightly issued, and that neither company was the exclusive owner of the said lands, and a partition was decreed. *Sioux City Railroad v. Union Pacific Railroad*, 307.
3. Fraudulent contract made by its officers; credit mobilier. *Wardell v. Union Pacific Railroad Company*, 330.
4. EASTERN TERMINUS.—MANDAMUS TO OPERATE ENTIRE LINE.—Eastern terminus of the road is on the Iowa shore of the Missouri river; the bridge over that river is part of its road within the requirement that it shall operate its whole railroad as "one continuous line," and the duty thus to operate the road was enforced by mandamus. *United States v. Union Pacific Railroad Company*, 479.
5. *Same*.—Transfer over bridge by local trains held illegal, *Id.*
6. BRIDGE.—Power of the company to bridge the Missouri river, and nature of its bridge franchise, *Id.*
7. TAXATION OF BRIDGE BY STATE AUTHORITY.—Under the revenue laws of Iowa, that portion of the bridge of the Union Pacific Railroad Company over the Missouri river, between Council Bluffs, Iowa, and Omaha, Nebraska, which lies within the limits of Iowa, may be taxed *as a bridge*, and not necessarily as a part of the road of the company; and this mode of taxation is not inconsistent with the decision of the supreme court in *The Union Pacific Railroad Company v. Hall*, 91 U. S. R. (1 Otto) 343. *Union Pacific Railroad Company v. Pottawattamie County*, 497.

UNITED STATES. See *Injunction*; *Internal Revenue*; *Mortgage*.

1. SUBROGATION to the right of the United States as a preferred creditor denied. *Wilkinson v. Babbitt*, 207.
2. LOUISVILLE AND PORTLAND CANAL COMPANY.—Rights in respect of the Louisville and Portland Canal Company; power over it, and Canal Company enjoined from interfering with the engineers and officers of the United States in repairing the canal. *United States v. Louisville and Portland Canal Company*, 601.
3. Whether the United States can compulsorily be made a defendant to a foreclosure bill, 378.
4. May enforce *taxes* by *suit*. *United States v. Pacific Railroad*, 66, 367.
5. *Set-off* not pleadable in suits by the United States for *taxes*, 66.

UNITED STATES—Continued.

6. *Fraudulent Claims* against the United States. Revised Statutes, section 5438, construed. *Ex parte Shaffenburg*, 271.

USURY. See *National Banking Associations*.

- Liability of usurer to assignee in bankruptcy, for *illegal interest* paid by the bankrupt. *Crocker v. National Bank of Chetopa*, 358.

VESSELS. See *Admiralty*.WARRANT OF ARREST. See *Extradition*.WARRANTIES. See *Insurance*.WHARF. See *Steamboat; Streets; Wharfage Tax*.

- What constitutes a wharf; police power over the landing of boats at the wharf, 18, 19.

WHARFAGE TAX.

1. WHARFAGE TAX.—TONNAGE DUTY.—A city cannot levy a tax in the nature of a tonnage duty upon vessels or commerce, nor can it do so by way of discrimination. But a city, under legislative authority, can lawfully charge reasonable compensation for the use of expensive and artificial conveniences, which a vessel may use at its option; there being ample space elsewhere for it to land within the harbor, where no artificial or expensive improvements have been made. *N. W. Packet Co. v. St. Louis*, 10.
2. *Same*.—ORDINANCE OF ST. LOUIS.—The ordinance of the city of St. Louis prescribing certain wharfage dues at the improved wharves constructed by it, graduated according to the size of the vessel, to be ascertained by its tonnage, is not in conflict with the provisions of the federal constitution in respect to inter-state commerce, nor with the prohibition that "no state shall, without the consent of congress, lay any duty of tonnage." *Ib*.
3. ILLEGAL.—RECOVERY BACK.—Wharfage taxes or dues paid under protest may be recovered back if the taxes or assessments were illegal, and the payment thereof involuntary. *Ib*.
4. *Same*.—VOLUNTARY PAYMENT.—Whether payment of wharfage taxes or dues under protest is an involuntary payment. *Ib*.

WIFE. See *Dower; Insurance*.







3 6105 063 275 411